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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 185

UNITED STATES OF AMERICA AND UNION CARBIDE CORPORATION, APPELLANTS

v.

B. J. BOYD, COMMISSIONER

AND

UNITED STATES OF AMERICA AND THE H. K. FERGUSON COMPANY, APPELLANTS

v.

B. J. BOYD, COMMISSIONER

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the Supreme Court of Tennessee (R. 33–52) is reported at 363 S.W. 2d 193. The opinion of the Chancery Court of Davidson County, Tennessee (R. 27–28) has not been reported.

JURISDICTION

These consolidated cases involve refund suits brought to determine the liability under the Tennessee Retailers' Sales Tax Act, as amended (Sections 67–3001 *et seq.*, 12 Tenn. Code Ann.), of Union Carbide Corporation and The H. K. Ferguson Company, for taxes on the use of tangible personal property in the performance of their management contracts with the Atomic Energy Commission. In each case the validity of the Tennessee statute was drawn in question on the ground of its being repugnant to the United States Constitution, but the Supreme Court of Tennessee upheld the statute.

The Supreme Court of Tennessee entered separate judgments in each case. The judgment in Carbide was entered on December 7, 1962 (R. 53), and amended by decree on March 4, 1963 (R. 53–55). The judgment in Ferguson was entered on December 7, 1962 (R. 85), and amended by decree on March 4, 1963 (R. 85–87). In each case, notice of appeal was filed in the Supreme Court of Tennessee on March 5, 1963. (R. 55–56, 87–89.) This Court noted probable jurisdiction on October 14, 1963. (R. 544.) The jurisdiction of this Court rests on 28 U.S.C. 1257 and 2101.

QUESTION PRESENTED

Whether, as construed and applied to tax the use of government-owned property by Union Carbide Corporation and The H. K. Ferguson Company in the performance of services under their contracts with the Atomic Energy Commission, the Tennessee Retailers' Sales Tax is unconstitutional because it violates the

immunity of the United States from State taxation by imposing a tax upon the use by the United States of its own property.

STATUTES INVOLVED

The relevant portions of the Tennessee Retailers' Sales Tax Act (12 Tennessee Code Annotated, Sections 67–3001 *et seq.*) are set forth in the Appendix, *infra*, pp. 53–57.

STATEMENT

This appeal involves refund suits brought by the United States, Union Carbide Corporation ("Carbide"), and The H. K. Ferguson Company ("Ferguson") against the Commissioner of Finance and Taxation of Tennessee (now Commissioner of Revenue) to recover Tennessee "sales and use" taxes paid by Carbide and Ferguson upon property used by them in the performance of contracts with the Atomic Energy Commission (AEC) relating to the latter's facilities at Oak Ridge, Tennessee. The actions will control the liability of Carbide and Ferguson for about $10,000,000 in accrued Tennessee use taxes on tangible personal property purchased, stored, used, or consumed under and in connection with the performance of their contracts with the Atomic Energy Commission. Under those contracts the United States pays any use taxes imposed upon the contractors.

1. THE STATE TAX ASSESSMENT AND PROCEEDINGS BELOW

The Tennessee Retailers' Sales Tax Act imposes a sales or compensating use tax of 3 percent upon the value of tangible personal property sold within, or

purchased outside but used within, the State. Sections 67–3003 and 67–3004 of the Act (Appendix, *infra*, pp. 53–56) in addition impose upon any contractor a tax of 3 percent of the value of tangible personal property used in the performance of his contract—

> whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax * * * unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

Acting under this and related provisions, Tennessee assessed sales and use taxes against Carbide for July 1956 of $71,372 and against Ferguson for November 1956 of $12,107. These assessments were based upon allegedly taxable procurements (the "sales" tax assessments) and uses (the "use" tax assessments) of tangible personal property by Carbide and Ferguson under their contracts with the Atomic Energy Commission (R. 34). Both contractors paid the taxes under protest out of funds provided by the AEC (R. 2, 34, 59).

Carbide, Ferguson, and the United States brought timely suits for a refund in the Chancery Court. They contended that the assessments were unconstitutional because the beneficial use of the property taxed was that of the United States rather than of the contractors (R. 2–14, 58–71). The trial court upheld the tax, ruling that Carbide and Ferguson were inde-

pendent contractors and not the servants of the United States, in both the procurement and the use of the property. (R. 27–30).

The Supreme Court of Tennessee upheld the validity of the use tax, ruling that "[i]n the general performance of their contracts we find they [Carbide and Ferguson] are independent contractors and, as such, are taxable on their private use of government-owned property." It reversed as to the sales tax on the ground that Carbide and Ferguson "are purchasing agents for the A.E.C. and, as such, their purchases are exempt from the Sales Tax because they are purchases by the Government" (R. 52).

2. THE ATOMIC ENERGY FACILITIES AT OAK RIDGE, TENNESSEE

During the period involved in this litigation, the three primary government-owned atomic energy facilities located at Oak Ridge consisted of a gaseous diffusion plant (sometimes referred to as the K–25 plant), the Y–12 plant, and the Oak Ridge National Laboratory. These plants and facilities represented an investment by the government in excess of $1,300,000,000 (R. 94–95, 108, 515–516).

The function of the gaseous diffusion plant is the enrichment of government-owned uranium in the isotope 235 for use in national defense and civilian programs. This is accomplished by the large scale separation of the uranium isotope 235 from a chemical compound of uranium by the process of diffusion through porous barriers containing billions of holes,

each smaller than two-millionths of an inch (R. 94–98, 516; Ex. C–10).

The Y–12 plant is used for further processing of the product of the gaseous diffusion plants for use in the national defense program; for the production of special products also for use in the defense program, including weapon components; for the production of stable isotopes; and for research in biology, reactor engineering, and process improvement and development. The plant also includes an extensive machine shop for the fabrication of special equipment (R. 95, 134–135; Ex. C–11).

The Oak Ridge National Laboratory is a nuclear research center and the source of most of the nation's radioactive isotopes. Its primary functions consist of: reactor research, design, and development; chemical processing; education and training of qualified technical people in atomic energy techniques; various atomic energy research and development activities; and the separation of radioisotopes for distribution and shipment throughout the world. (R. 135–137; Ex. C–12.)

3. THE RELATIONSHIP OF CARBIDE AND FERGUSON TO AEC

A. CARBIDE

Carbide operates the principal Atomic Energy Commission plants at Oak Ridge, Tennessee. The plants are used to produce special nuclear material and to carry on research and development work in atomic energy under the direction of the AEC, pursuant to

the Atomic Energy Acts of 1946 and 1954, as amended. (R. 94–95.)

Prior to its association with the AEC, Carbide had no experience in the atomic energy field, and the primary purpose of the AEC in engaging Carbide was to utilize and gain the benefit of its management knowledge in business and industrial operations. (R. 35, 93, 100.) Carbide's "management contract," which is typical of those utilized by the AEC in operating its large-scale industrial undertakings (R. 35), provides in the opening paragraph of Article 1 that (R. 428–429):

> The Government expressly engages the Corporation to manage, operate and maintain the plants and facilities described below, and to perform the work and services described in this contract, including the utilization of information, material, funds, and other property of the Commission, the collection of revenues, and the acquisition, sale or other disposal of property for the Commission, subject to the limitations as hereinafter set forth. The Corporation undertakes and promises to manage, operate and maintain said plants and facilities, and to perform said work and services, upon the terms and conditions herein provided and in accordance with such directions and instructions not inconsistent with this contract which the Commission may deem necessary or give to the Corporation from time to time. In the absence of applicable directions and instructions from the Commission, the Corporation will use its best judgment, skill and care in all matters pertaining to the performance of this contract.

Although Carbide exercises managerial discretion in many aspects of operations, the AEC has the right and authority to control, direct, and supervise the performance of its work in such manner and to such extent as it deems necessary or advisable, and it has exercised this right and authority, both in the broad aspects of operations and administration and in many detailed, specific areas. The relationship between the Commission and Carbide is intended to be like that between the home office of an industrial concern and its branch offices. (R. 236–239.)

The operations carried on by Carbide in the AEC facilities at Oak Ridge are a part of a large and closely integrated industrial complex of the AEC located in a number of States. (R. 94–95.) For the purpose of supervising and controlling these operations, including the work performed by Carbide and Ferguson, AEC maintains a large staff of government employees at Oak Ridge. At the time of this litigation, the staff consisted of almost 1,000 people. (R. 104, 109.) This staff determines for the entire system the amount of material to be processed; contracts for acquisition of raw materials; determines allocation of material to various processing sites; establishes rates of production, the types of products to be made, and the use of particular processes; transports or arranges for transportation of feed and process materials between the various facilities; procures the electric power needed; exercises direct control over source and special nuclear material use; establishes research and training programs; and otherwise directs and coordinates

the operations of the several management contractors involved. (R. 90–300.)

For the management of AEC facilities, properties, and funds, the AEC has established accounting, fiscal, procurement, property management, safety, security, and personnel policies with which Carbide is required to comply. These policies are not expressed in general terms; they are specific instructions stated in detail in the AEC Manual which consists of many thousands of pages setting forth with particularity the procedures which Carbide must follow. (R. 45–46, 115–117, 236–239.)

Carbide has no investment in the Oak Ridge facilities (R. 175–181, 272). The only property of any kind owned and used by Carbide in the contract work consists of certain nitrogen storage tanks and related equipment under lease to the government, and eight automobiles (R. 272).

B. FERGUSON

The contract with Ferguson was made in 1956. Ferguson agreed to perform various and unspecified construction-type activities for the AEC at Oak Ridge, including the building of some new facilities as well as the modification of existing facilities. The contract was necessary because the rapidly changing needs for modifications of the facilities at Oak Ridge required construction on short notice and adaptability to changes even during the course of a particular construction job. The Supreme Court of Tennessee found that in many respects the AEC contracts with Carbide and Ferguson are identical (R. 35, 110, 479–480).

With respect to the Ferguson contract, the AEC retained primary responsibility for all construction programs, executed and administered all architect-engineer contracts, and established policies and procedures in both construction and engineering matters. AEC personnel were stationed in the same building which housed Ferguson's management personnel and directed Ferguson's operations on a day-by-day basis. There were, in addition, regular weekly discussions between AEC and Ferguson personnel at which the AEC staff scheduled specific jobs or directed reassignment of Ferguson manpower from job to job to meet changes in operating requirements. AEC personnel directed changes in construction methods used by Ferguson, authorized Ferguson to proceed on work or suspend work or to increase or decrease forces, and otherwise prescribed the manner of conducting work in minute detail (R. 315–317, 338–339, 354–355, 361, 368–369, 372–375, 401–402).

In addition to the direct control and supervision which AEC exercised over Ferguson's operations, it also controlled them through budgetary provisions and through issuance of construction directives outlining in detail the work to be done and the money to be expended (R. 313, 377). This control included such matters as accounting and reporting, property management and procurement, personnel policies, engineering and construction, health and safety of the employees and public, and security. AEC staff personnel audited operations for compliance with required policies and procedures and gave specific instructions from time to time as to proper accounting

treatment of various transactions. (R. 315–335, 371–374, 385–686, 409–418).

Ferguson does not own any of the property used by it in the performance of its contract. (R. 324–325.)

4. THE PROPERTY USED BY CARBIDE AND FERGUSON

In connection with the performance of their contracts, Carbide and Ferguson have acquired or obtained for the account of AEC, or have been furnished by the AEC, tangible personal property of the kinds described as being taxable under the Tennessee Retailers' Sales Tax Act. The Tennessee tax has been applied to every item of government-owned personal property used by Carbide or Ferguson except for atomic and certain other enumerated materials. By administrative interpetation the tax has not been applied to certain property owned by the United States prior to the time it is brought into Tennessee. (R. 528–533, 539–543.) Carbide has been taxed on the "use" of government-owned manufacturing equipment, component parts, office equipment, machine tools, computing machines, and various chemical and other products necessary for research activities.

Neither Carbide nor Ferguson has ever had title to the property the use of which is taxed. Title to property procured by Carbide or Ferguson passed from the vendors directly to the United States; title to property owned by the government and furnished to Carbide or Ferguson remained in the government. The AEC advances the funds used in the operations carried on by Carbide and Ferguson. These funds,

which remain government-owned until expended, are placed in a special bank account, designated as a Government Fund Account, in a bank certified as a depository for federal funds by the Treasury Departmnet. Finally, neither Carbide nor Ferguson is free to use the government-owned property except on behalf of and under the direction of the Atomic Energy Commission. (R. 41–42, 133, 138, 175–181, 317–335.)

5. COMPENSATION PAID TO CARBIDE AND FERGUSON

Both Carbide and Ferguson are paid a fee for their services and neither owns or sells any products made at Oak Ridge, except as agent for the AEC. In each case the fee is measured by the value of the contractor's services; neither company's fee would be directly affected by a more or less efficient use of the government-owned property.

Carbide's fee is negotiated prior to the commencement of each contract term (generally four years) on the basis of an estimate of the value of the services to be performed. At the time involved in this litigation, Carbide received a monthly fee of $229,250. Ferguson's compensation is negotiated semiannually on the basis of the value of the services Ferguson has performed during the preceding six months. For example, for part of the period involved in this case, Ferguson performed work of an estimated cost of $542,130, for which a fee of $20,000 was agreed upon. (Ex. C–8, R. 437; Ex. F–1, pp. 70–71.)

SUMMARY OF ARGUMENT

1. The constitutional immunity of the United States from direct taxation is twofold: A State may not

make the United States liable for a tax; and a State may not make the property, activities, rights, or benefits of the United States the object of a tax, even if the tax is imposed upon and collected from a private party. It is with the latter aspect of the government's immunity from State taxation that the present case is concerned; the same has been true of most of the tax-immunity cases decided in recent years by this Court. In particular, this Court has held that while private individuals may be taxed on the benefits they enjoy from the use of tax-exempt property owned by the United States (*United States* v. *City of Detroit,* 355 U.S. 466), it has also held that private parties cannot be made liable for a tax on the beneficial use of government property where the United States alone enjoys the benefits of this use. *Livingston* v. *United States,* 364 U.S. 281, affirming *per curiam United States* v. *Livingston,* 179 F. Supp. 9 (E.D.S.C.). The application of this constitutional standard does not depend upon whether the private party who is taxed is a servant or a contractor in his dealings with the United States.

2. The Tennessee tax in the present case, like the taxes in the *City of Detroit* case and the *Livingston* case, is a tax on the benefits of use of government property and therefore can be applied only if the private servants or contractors who are taxed—and not just the United States—enjoy the benefits. The fact that a private party—whether a servant or a contractor—is paid for his services which involve the use of government property is not in itself a sufficient basis for imposing a tax on the benefits of using

government property. The benefits of use of plant, materials, and equipment are enjoyed only by the person who has a right to sell or personally enjoy the product or products made with the property or otherwise profit from the value of the property as an instrument of production. In the Michigan cases decided by this Court, of which the *City of Detroit* case was one, the private contractors enjoyed this right although the property they used belonged to the United States. But an employee or contractor who is merely paid for his services and has no claim to the product made by combining his services with the property belonging to his employer does not enjoy the benefits created by use of this property. The reward he receives—his fee—reflects only the value of his services, not the value of the property he uses. He, therefore, cannot be taxed for the use of this property. This was the alternative holding of the district court in *United States* v. *Livingston, supra.*

The Tennessee tax on the beneficial use of untaxed property cannot be sustained by construing it as a tax on the benefits a private party receives as payment for services which happen to involve the use of tax-exempt government property. Tennessee does not purport to tax the benefits of payment for services. Indeed such a tax could not be measured by the value of the property used in performing these services, for there is no direct relationship between the amount paid the employee or contractor for his services alone and the value of the equipment he uses. The imposi-

tion of such a tax only on those employed to use government or other tax-exempt property would, moreover, be unconstitutionally discriminatory, since a private party receives no additional benefit from performing services with government property rather than with property belonging to a private person.

3. The AEC discharges the responsibilities imposed upon it by statute through the use of management contractors such as Carbide and Ferguson—a means of carrying out its responsibilities that was expressly authorized by and in accord with the national policy expressed in the Atomic Energy Acts of 1946 and 1954. See *Carson* v. *Roane-Anderson Co.* (and *Carbide and Carbon Chemicals Corp.*), 342 U.S. 232. The sole benefits Carbide and Ferguson received from their management contracts with the AEC were payments for their services. Their use of government property was entirely on behalf of the United States and was subject in almost every detail to the government's frequently exercised right to direct the use to be made of the property. They used the government's plant, equipment, and materials because they were told to and paid to, not because they chose to and not because they profited from the products this property helped to produce. The amount each received for its services is unrelated to the value of the property it used. The use of government property which was taxed by Tennessee was, in short, a use by the government in the only sense that the government can ever use its property—

through payments to employees and contractors for their services. Both in terms of the benefits enjoyed by Carbide and Ferguson and in terms of their lack of control over the use to be made of government property, any benefits from the use of the government property have always belonged to the United States. The Tennessee tax is therefore an unconstitutional tax on the federal government's use of its own property.

Finally, even if, contrary to our primary contention, the existence of tax immunity turns upon whether the party taxed for use of government property is an independent contractor or a servant, in agency terms, the record in this case shows that Carbide and Ferguson were so completely subject to the Commission's right to control their activities that they were servants in the performance of their management contracts with the AEC.

ARGUMENT

Introductory.—Our argument rests upon two simple propositions: *First*, a State may not impose a tax upon the property of the United States, nor upon its beneficial use where the use inures solely to the benefit of the United States. *Second*, the United States, not the contractors, enjoyed the beneficial use of the property taxed by Tennessee.

In our view, therefore, the Supreme Court of Tennessee erred in supposing that the decisive question was whether the contractors were servants or independent contractors. The question is whether they

enjoyed the beneficial use of the government's property. We submit that they did not.

However, we also argue that if the former question be relevant, the government must still prevail because the contractors are servants as a matter of law.

I

A STATE MAY NOT LAY A TAX UPON THE PROPERTY OF THE UNITED STATES NOR UPON ITS BENEFICIAL USE WHERE THE USE INURES SOLELY TO THE BENEFIT OF THE UNITED STATES

A. Distinguishing two aspects of a tax—(1) the person made liable and (2) the thing taxed—is crucial to any discussion of the federal government's immunity from direct State taxation. A tax imposes a liability upon described persons with respect to particular objects of taxation. The person taxed may be a private individual, a partnership, an estate, a corporation, etc. The objects of State taxation have been even more varied. A State may tax property, gross income, net income, sales, purchases, rights to engage in particular activities, the use of property not subject to a sales tax, the use of property not subject to an annual property tax, and other objects as well. The federal government has always been accorded a constitutional immunity from State taxation with regard to both aspects of a State tax.

A series of decisions beginning, at the latest, with *James* v. *Dravo Contracting Co.*, 302 U.S. 134, has established that a State is not constitutionally forbidden from making a private party liable for a tax upon any one of these objects simply because the economic

burden of the tax will fall upon the United States.[1] On the other hand, it has never been doubted that a State may not make the United States liable for a tax. Beyond this, the Court has repeatedly held that a State may not make a private party liable for a tax the object of which is the property, activities, privileges, receipts, etc., of the United States. It is with regard to this last group of decisions that the present case is particularly concerned.

This Court has, since long before *United States* v. *Allegheny County*, 322 U.S. 174, 183, assumed the task of determining the object of a state tax and forbidding its imposition, even on private parties, if that object is the property or activities of the United States. Thus, while a State may impose a property tax on its citizens with respect to *their* property regardless of the ultimate economic burden of the tax, it may not impose an ordinary *ad valorem* property tax on property belonging to the United States even if it attempts to impose liability for the tax upon private parties. *United States* v. *Allegheny County*, 322 U.S. 174.[2] Again, while a State may impose a sales

[1] This proposition is, of course, limited by the rule that "a tax may be invalid even though it does not fall directly on the United States if it operates so as to discriminate against the Government or those with whom it deals." *United States* v. *City of Detroit*, 355 U.S. 466, 473. See also *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, and *Moses Lake Homes* v. *Grant County*, 365 U.S. 744.

[2] A number of more recent cases decided by the highest State courts have reaffirmed this principle: See, *e.g.*, *Ford Motor Co.* v. *Korsen*, No. 37908, Supreme Court of Illinois, decided Jan. 22, 1964; *Martin Co.* v. *State Tax Comm.*, 225 Md. 404, 171 A. 2d 479; *Continental Motors* v. *Township of Muskegon*, 365 Mich. 191, 112 N.W. 2d 429.

tax on private parties for their purchases, even if the purchases are for use on a government contract (*Alabama* v. *King & Boozer*, 314 U.S. 1), it may not impose such a tax on private parties for purchases they have made as agents for the United States. *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110. And, while a State may tax its private residents on the gross receipts they receive from the United States (*James* v. *Dravo Contracting Co., supra*), it may not tax them on the gross receipts to which the United States is entitled from an enterprise it owns and operates through the services of these private parties. See *Roane-Anderson Co.* v. *Evans*, 200 Tenn. 373, 292 S.W. 2d 398. Finally, while a State may tax its citizens for the benefit of *their* use of tax-exempt property owned by the United States (*United States* v. *City of Detroit*, 355 U.S. 466), it may not tax them for the use of property the benefits of which belong solely to the United States. *Livingston* v. *United States*, 364 U.S. 281, affirming *per curiam*, *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C.).

In short, the constitutional immunity of the United States from State taxation is twofold: (1) a State may not make the United States liable for a tax and (2) a State may not make the property or activities of the United States the object of a tax, even if it is imposed upon private persons. As a practical matter, the latter immunity has been the more important; for as Justice Jackson pointed out the *Allegheny* case (322 U.S. at 188), "Rarely does a state or munici-

pality pursue the Federal Government itself. Most of the immunity cases we have been called upon to deal with involved assertion of a right to tax Government property against an individual." Without the latter immunity, even the most basic constitutional protection of the United States could be set aside by the simple expedient of forcing the private individuals through whom the United States necessarily conducts its activities to become State tax collectors by imposing on them the initial liability for taxes on the operations of the federal government and by relying upon them to obtain reimbursement from the United States.

In deciding whether this constitutional immunity is applicable, the Court, in each case, looks to what it is that the State purports to tax and determines whether this object of the tax is the property or activities of the United States or those of a private person. A State gross receipts tax or a tax on the right to run a business cannot be imposed on a post office, whether the United States or the private postmaster is made liable for the tax, because the business and receipts are those of the federal government. An ordinary *ad valorem* property tax cannot be imposed on government desks or vehicles whether it is to be collected from the federal government or the private party using this property on behalf of the government because the property is owned by the federal government. On the other hand, the net income of a federal employee can be taxed because it belongs to the employee, not the United States. And the gross receipts

a contractor has received from a government contract can be taxed because they are his receipts, not those of the government.

B. This constitutional standard in terms of the object of the State tax applies to taxes on the beneficial use of government property. The benefits of using for one's own purposes tax-exempt government property may be taxed, for the tax is on benefits accruing to the private individual. But the use of government property may not be taxed where the economic and other benefits of such use accrue solely to the government, for this tax would be on the benefits the government receives from the use of its own property. This is, moreover, true whether the private party who is taxed is a contractor or a servant.

In *United States* v. *City of Detroit*, 355 U.S. 466, *United States* v. *Township of Muskegon*, 355 U.S. 484, and *City of Detroit* v. *Murray Corp.*, 355 U.S. 489 (hereafter called "the Michigan cases"), this Court held that a State tax can be imposed upon a private party for the use of tax-exempt government property "for its own 'beneficial personal use' and 'advantage.'" 355 U.S. at 472. Such private benefits of use were found not only in *United States* v. *City of Detroit*, where Borg-Warner used the property in its own private manufacturing business, but also in *Muskegon* where Continental was found to be as free as "any other private party supplying goods for his own gain to the Government" to use "the property as it thought advantageous and convenient in performing

its contracts and maximizing its profits from them" (355 U.S. 486–487), and in *Murray* where the tax was sustained because "Lawful possession of property is a valuable right when the possessor can use it for his own personal benefit" (355 U.S. at 493).

The Court's conclusion sustaining each tax was squarely bottomed on its findings that in each of these cases the private parties who were taxed enjoyed the economic benefits created by use of the property. Thus, the Court reasoned that a "tax for the beneficial use of property, as distinguished from a tax on the property itself, has long been a commonplace in this country" (355 U.S. at 470). The taxes in the Michigan cases were found to be imposed on this privilege of "beneficial personal use," and that privilege belonged to the private user not to the government. Therefore, a tax could be imposed on this use, though not on the property itself. Finally, the tax was held not to discriminate against the government in applying only to the use of tax-exempt property, for the users of tax-exempt property otherwise "might well be given a distinct economic preference over their neighboring competitors * * *." 355 U.S. at 474. There were, in short, unique cost and competitive advantages of personal use of tax-exempt property, as opposed to taxed property, and these advantages could be taxed as any other economic benefits enjoyed by a private person can be taxed.

It is clear that the Michigan cases merely applied, to a different tax, an established doctrine—that a

private party may be taxed on his own economic advantages or benefits although much of the burden of the tax may be passed on to the United States. The cases held that these taxable private benefits included the advantages of use for one's own purposes of untaxed government property. The Michigan cases did not alter, but rather reasserted, the established rule that private parties cannot be taxed on the government's property, activities, or economic advantages. The *Allegheny County* case was distinguished as a tax on the government's property, not on the private benefits of private use of it. *United States* v. *City of Detroit,* 355 U.S. at 471, 472. The taxes in issue were sustained because they were imposed on the private beneficial use of government property and not on either the government's property or the government's beneficial use of its own property. Under established doctrine, as this Court was later to rule in *Livingston* v. *United States,* 364 U.S. 281, a private party could not constitutionally be taxed on the government's beneficial use of its own property. Moreover, as the decision in *Livingston* confirmed, the question whether a private party enjoys a beneficial and therefore taxable use of government property remains one of federal law. *United States* v. *Allegheny County,* 322 U.S. 174, 184.

II

THE UNITED STATES, NOT THE CONTRACTORS CARBIDE AND FERGUSON, ENJOYED THE BENEFICIAL USE OF THE PROPERTY TAXED BY TENNESSEE

Under the principles discussed in Point I this case turns upon the question whether Carbide and Ferguson or the United States enjoyed the beneficial use of the property of the United States that Tennessee sought to tax. While the employees of Carbide and Ferguson physically used the property in the same way that a secretary uses a government typewriter or an independent contractor uses a government post office building in handling the mail, the test of *beneficial use*, in our view, is whether the contractors stood to gain or lose in any substantial way from the result of their physical use of the property. The mere receipt of a fixed amount of compensation for the services rendered or managerial skill furnished in connection with the use of the property is not sufficient, as we now show, to constitute a beneficial use. Under their contracts with the United States Carbide and Ferguson received only monetary compensation, the amount of which was in no wise dependent upon the utility, condition, or productiveness of the property of the United States, and they neither enjoyed nor controlled the fruits of their work.

If control over the way the property is used be material, which we doubt, it is also clear that neither Carbide nor Ferguson had sufficient control over the use of the property in question to lead to the conclusion that they enjoyed its beneficial use. From this standpoint, the question of whether Carbide and Ferguson were employees or independent contractors, while in some respects parallel to the question here, is nonetheless immaterial. Even if it be relevant, however, the decision below should be reversed because Carbide and Ferguson were employees, not independent contractors.

A. PROOF THAT A GOVERNMENT EMPLOYEE OR CONTRACTOR IS PAID FOR HIS SERVICES WILL NOT ALONE SUPPORT A STATE TAX UPON HIS PHYSICAL USE OF GOVERNMENT PROPERTY

I. The Tennessee use tax in the present case, like the taxes in the Michigan cases and like the South Carolina tax in *Livingston*, is a tax on the benefits of use of property. It was described by the Tennessee Supreme Court as a tax on "all of those who have a private beneficial use of exempt property" (R. 52).[3]

[3] The pertinent provisions of the Tennessee Retailers Sales Tax Act are set forth in our appendix, *infra*, pp. 53–57. Prior to 1955 the Tennessee Statute contained no provision specifically imposing a tax on a contractor's use of tax-exempt property. Indeed then, as now, a taxable "use" was defined as including "the exercise of any right of or power over tangible personal property *incident to the ownership thereof*." (emphasis added) Section 67-3002(h). Tennessee had nevertheless attempted to tax agents and contractors dealing with the United States on their purchases and use of government property. In 1952, in *Carson* v. *Roane-Anderson Co.* (and *Carbide and Carbon Chemicals Corp.*), 342 U.S. 232, this Court affirmed a decision of the Tennessee Supreme Court, holding that these taxes could

As this Court pointed out in the *City of Detroit* case, this type of tax on beneficial use "has long been a commonplace in this country." 355 U.S. at 470.

A State may not make even a private party—whether a servant or a contractor—liable for a tax on the beneficial use of government property unless there is a meaningful sense in which the private party, and not just the United States, enjoys the benefits of this use. It is, therefore, necessary in each case to determine whether the benefits of use which are taxed are those of the United States or those of the private party.

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not be imposed because of the immunity provision then found in Section 9(b) of the Atomic Energy Act of 1946, c. 724, 60 Stat. 765 (42 U.S.C. (1952 ed.) 109(b)). This federal statutory exemption was repealed by the Act of August 13, 1953, c. 432, 67 Stat. 575, but the Senate Committee report makes clear that the repeal was not intended to waive the Commission's constitutional immunity. S. Rep. No. 694, 83rd Cong., 1st Sess. (See also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 116–117.)

In 1955 the Tennessee Statute was amended to impose a tax specifically upon the use of tax-exempt property by contractors, if the property had not previously borne a sales or use tax. (R. 48–49) This is now accomplished by Section 67–3003 which taxes any use of personal property "irrespective of * * * any tax immunity which may be enjoyed by the owner thereof"; Section 67–3004, *infra*, pp. 55–56, which specifically taxes a contractor's use of untaxed property; and Section 67–3017, which makes the contractor a "dealer" from whom the tax may be collected. (See also Section 67–3004, exempting certain uses of atomic energy materials and uses directly by government employees and Section 67–3018, making the seller of goods liable for the sales tax even when the purchaser enjoys immunity.)

There is, of course, a sense in which almost every use of government property results in a private benefit. The United States can only use its property through the services of private parties (employees or contractors) and these private parties are almost always paid for their services. However, the benefits received as payment for services performed with government property cannot, without more, be the basis for a tax on the beneficial use of government property. That a different type of beneficial use of government property—a use like that in the Michigan cases—is constitutionally required to sustain a State use tax is, we submit, the entirely correct holding of the district court in *United States* v. *Livingston,* 179 F. Supp. 9 (E.D.S.C.), affirmed *per curiam* in *Livingston* v. *United States,* 364 U.S. 281.

2. The leading decisions defining the taxable benefits of private use of government property are the Michigan cases and the *Livingston* case. In each of the Michigan cases a private party used government property to manufacture goods which it then sold for its own profit. The goods which were sold by the private parties were, in the most direct sense, private fruits of use of government property, for they were produced with govenment-owned plant, materials, and equipment. In two of the cases these goods were sold to the United States but this did not make them less the fruits of private use of government property. As this Court said in the *Muskegon* case, the contractor remained as free as "any other private party supplying goods for his own gain to the Government"

to use "the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them." 355 U.S. 486–487.

The Michigan cases thus held that a private party that owns and sells goods created by use of government property and that is free within broad limits to use that property as it sees fit, enjoys taxable benefits of the use of this property. These cases reserved for another day the questions presented by payment of a private party for its services in using government property, on behalf of the government and under the control and supervision of the government, to produce goods which are not sold to the United States but are at all times the property of the United States (355 U.S. at 486):

> The vital thing under the Michigan statute, and we think permissibly so, is that Continental was using the property in connection with its own commercial activities. The case might well be different if the Government had reserved such control over the activities and financial gain of Continental that it could properly be called a "servant" of the United States in agency terms. But here Continental was not so assimilated by the Government as to become one of its constituent parts. It was free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them.

The facts of the later *Livingston* case were, in most respects, strikingly similar to those presented here. South Carolina attempted to impose its sales and use taxes upon the purchase and use of government prop-

erty by the AEC's management contractor at its Savannah River Plant—E. I. duPont de Nemours and Company ("DuPont"). The terms of the contract and the nature of the relationship between DuPont and the AEC were, as spelled out in the district court opinion, much the same as those used by the AEC with its management contractors (Carbide and Ferguson) at Oak Ridge. The operational and management "know-how" of the DuPont company was to be employed, under the direction and supervision of the AEC, to build and operate production facilities on behalf of the AEC. The United States owned all materials and equipment used by DuPont. DuPont, like the management contractors at Oak Ridge, was employed to perform services and had no claim to the products made at Savannah River. The arrangement with DuPont differed in one respect from that in this case. DuPont received only the nominal fee of $1 in direct payment for its services, plus an allowance for overhead expenses (*United States* v. *Livingston,* 179 F. Supp. 9, 28 (E.D.S.C.), dissenting opinion); on the other hand, Carbide received a stated monthly fee but did not receive any allowance for overhead expenses.[4]

The district court in *Livingston,* like the Tennessee Supreme Court below, held that the management contractor's purchases were made as agent for the United States and were therefore immune from State tax-

[4] In the case of Carbide certain expenses of the contractor were specifically excluded from the allowable-cost provisions of the contract and had to be paid by Carbide out of its fee (R. 274, 442). The same was true of Ferguson (R. 485).

ation. The district court did not, however, find that in its operation of the Savannah River Plant—in its use of the government plant, materials, and equipment—DuPont was so closely controlled by the AEC that it was a servant. Its decision that the use of the government's property by DuPont could not constitutionally be taxed was bottomed on a different ground that made it unnecessary to determine whether DuPont was a servant. The court held that a private party—whether a servant or a contractor—cannot be taxed on the benefits of using government property in ways and for purposes specified by the government if the only benefit the private party receives from use of that property is payment for its services.

Assuming, *arguendo,* that, beyond the nominal fee, both tangible and intangible benefits (both sales to AEC by DuPont and General Motors and the acquisition of valuable experience) may have rewarded DuPont for its work at the Savannah River Plant, the district court held that something very different from payment for its time and services is necessary "[f]or the possessor of government property to have a separable, taxable use * * *." The court said (179 F. Supp. at 23):

> The custodian of a federal post office building is paid for the performance of his duties, but his use of the materials he requires in the performance of his housekeeping duties is so completely that of the United States that no one would think of taxing him upon the value of the materials. In each of the Detroit cases, the Supreme Court was concerned with taxa-

> tion of a completely separate business enterprise which used government property for its purposes of profit and which derived as much advantage from the use as if it had legal title to the property. No such condition is to be found here. The use of the Savannah River Plant and of goods and materials purchased for its operation is so completely that of the United States, that, while one may concede the possibility of advantage to others, those others do not become subject to taxation upon the value of the plant or its purchases when, by contract, and in good conscience without a contract, the United States must pay any tax exacted. In a sense, of course, du Pont may be said to have the use of all of the materials and facilities at the Savannah River Plant, but in the same sense it may be said that the individual members of the AEC have the use of all of the facilities entrusted to their care. * * *

In short, the district court opinion in *Livingston* held that the immunity from the South Carolina use tax depended only upon the fact that whatever rewards Du Pont received were payments for its services. This immunity did not depend upon Du Pont's being a servant or upon the size of the rewards it received for its services. We submit that this holding was plainly correct and is fully applicable to the Tennessee use tax and the management contractors at Oak Ridge.

3. The benefits enjoyed by either an employee or contractor solely as a reward for rendering services are not, have never been, and cannot be taxable benefits of the use of property. Products are made by

a combination of property (plant, materials, and equipment) and services. The benefits of sale or use of these products are traceable in part to the property used in making them and in part to the services employed in making them. But the benefits of use of the plant, materials, and equipment are enjoyed only by the persons who has a right to sell or personally enjoy the products made or otherwise profit from the value and utility of the property as an instrument of production. An employee or contractor who is merely paid for his services does not enjoy the taxable benefits attributable to use of the plant, materials, and equipment.

A government printer cannot be taxed on the use of the press; a government scientist cannot be taxed on the use of laboratory facilities and equipment; a government secretary cannot be taxed on the use of her typewriter or desk. The reason for this is that servants are paid for their time and services and neither own and sell nor personally enjoy the benefits of using the employer's property. It is the employer, not the employee, who receives and owns the economic benefits that are created by and reflect the value of the property used by an employee. The owner or tenant of a gas station, not the salaried attendant, enjoys the benefits of use of the pump; the owner or lessee of the steam shovel, not the operator, enjoys the benefits of its use.

A contractor generally uses its own equipment and sells a product or result, not its time and services. But a contractor, no less than an employee, can sell its

time and services in using another's equipment and, in such a case, just as in the case of an employee, the owner of the equipment enjoys all the taxable benefits of the use of that property. An express company hired at a monthly fee to manage and operate a post office on behalf of the United States does not enjoy the taxable benefits of the use of the post office if all receipts from its operations belong to the United States. Similarly, just as a salaried janitor in a government building receives no taxable benefit from the use of a government-owned waxing machine, an independent firm which is paid a weekly fee to hire and supervise janitors does not enjoy the fruits of use of the same equipment. In each of these examples, just as in the examples involving employees, a tax on the beneficial use of government property would be a tax upon the United States because the private party receives only payment for its services and the United States both controls and reaps all the benefits from

4. It is, of course, true that either an employee or a contractor paid for services involving the use of government property benefits indirectly by the use of that property. If the government did not own the property (for example, the post office), there might be no job to be done or to be paid for (running the post office). But Tennessee does not purport to—and no State has ever attempted to—tax these exceedingly remote benefits of the use of tangible personal property. It purports to tax only the privilege of using personal property for one's own personal purposes,

either of immediate enjoyment or to create a work-product which one is then free to enjoy by use or sale. See *supra*, pp. 25–26.

Indeed, the inapplicability of a tax on the benefits of use of property where the taxpayer has merely received a fee for his services is far more than a matter of chance, custom, or choice. A tax on the use of property cannot be imposed on one paid only for his services without being wholly arbitrary in its application. There is no direct or even general relationship between the amount paid an employee or contractor for his services alone and the value of the equipment used on behalf of the government or on behalf of any other party that owns this equipment and pays for these services. There is no rational basis for taxing a porter on a train far more than the driver of a bus simply because a pullman car costs much more than a bus. A man using a steam shovel cannot be taxed one thousand times as much as a man using a hand shovel simply because the steam shovel costs one thousand times as much, when the rewards each receives depends on the value of his services, not on the value of the equipment he is using.

Beyond this, there is no justification for a tax on the benefits paid for performing services with government or other tax-exempt property when no tax is imposed on the benefits paid for services performed with private property. The resulting discrimination against parties dealing with the United States would, without more, be unconstitutional. See *supra*, p. 18,

n. 1. The justification for taxing only the use of tax-exempt property in the Michigan cases was clear: there may be unique cost and competitive advantages of using, for one's personal benefit, property which has not been subjected to a tax and which can therefore be obtained at a cheaper price. But there is absolutely no justification for taxing a secretary more because she is employed by the government to use an untaxed typewriter or for taxing a janitorial contractor more because it contracts to perform work for a monthly fee using tax-exempt government equipment. Neither the secretary nor the janitorial contractor will be paid more when services are performed with tax-exempt property than when the same services are performed with taxed property. They, therefore, cannot be subjected to a unique tax which falls only on those dealing with the United States and other tax-exempt bodies.

B. NEITHER CARBIDE NOR FERGUSON ENJOYED THE BENEFICIAL USE OF THE GOVERNMENT PROPERTY UPON WHICH THE TENNESSEE TAX IS IMPOSED.

Under the Atomic Energy Act of 1954, as amended, the AEC is charged with the responsibility for conducting research and development activities in the field of atomic energy in its own facilities (42 U.S.C. 2051, 2052). The Act also provides that (with certain limited exceptions) the AEC shall be the exclusive owner of all production facilities for special nuclear material and charges the Commission with the responsibility for the production of such material (42 U.S.C. 2061). The AEC is specifically authorized

to acquire such materials, property, equipment, and facilities, and to establish, construct, and modify such buildings and facilities as, from time to time, it deems necessary to carry out its functions. (42 U.S.C. 2201). Since the beginning of the AEC's operations, the Commission has conducted most of the activities for which it is responsible under the statute through the use of management contracts with industrial concerns and educational institutions. This is in accord with the national policy established by the Atomic Energy Acts of 1946 and 1954, under which the AEC was expressly authorized to use management contracts in the conduct of its activities. See *Carson* v. *Roane-Anderson Co.* (and *Carbide and Carbon Chemicals Corp.*), 342 U.S. 232. See also *United States* v. *Livingston*, 179 F. Supp. 9 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 281.

In the *Carson* case, this Court held that the work conducted by Carbide under a contract which was substantially the same as the Carbide and Ferguson contracts in this case constituted "activities of the Commission" within the meaning of the tax-exemption provisions of Section 9(b) of the 1946 Act. Making particular reference to the Congressional intent to have the Atomic Energy Commission's operations conducted in large part through the services of private firms possessing "the skill and experience of American industry,"[5] the Court stated (342 U.S. at 236):

> Certainly where the pattern of conduct visualized by the Act is the use of independent con-

[5] S. Rep. No. 1211, 79th Cong., 2d Sess., p. 15.

> tractors or agents from the field of private enterprise, the inference is strong that "activities" means all authorized methods of performing the governmental function. We find no contrary evidence from the legislative history.

The constitutional issue which the Court did not have to face in *Carson* is squarely presented in this case because of the subsequent repeal of the statutory tax exemption, leaving the AEC to its constitutional immunity. S. Rep. No. 694, 83d Cong., 1st Sess.; see also *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. at 117. As we shall show, the activities of Carbide and Ferguson are in every respect the activities of the Atomic Energy Commission discharging its responsibilities by a means it was specifically authorized to adopt—the use of management contractors. Carbide and Ferguson do not enjoy the beneficial use of government property in carrying out these activities.

The sole benefits Carbide and Ferguson received from their management contracts with the AEC were payments for their services. Each was, moreover, subject to such extensive control by the AEC in the use of government property that it was in no sense "free within broad limits to use the property as it thought advantageous and convenient in performing its contracts and maximizing its profits from them."[8] Their use of this property was a use entirely on behalf of the United States and was subject, in almost every detail, to the government's right to direct the use to be made of the property. They could not

[8] *United States* v. *Township of Muskegon*, 355 U.S. 484, 486.

profit by any increase or decrease in production because of the efficiency of inefficiency of the government-owned equipment; they used this equipment because they were told to and paid to, not because they wanted to, and not because they profited from the products this property helped to produce. Any benefits from the use of the government-owned property have always belonged to the United States; any tax on the benefits of using this government property is therefore a tax upon the United States, which alone enjoys the benefits of its use.

1. Carbide did not enjoy the beneficial use of government property

a. Introduction

The relationship of Carbide to the Atomic Energy Commission is spelled out with great clarity in the contract which appears at pages 427 to 478 of the record and in the excerpts from testimony which appear at pages 90 to 300 of the record. There is no dispute about the basic facts. They are detailed, however, and we believe it is useful to begin with a summary of what they reveal.

Carbide is hired to operate and manage for the Atomic Energy Commission facilities producing atomic materials and conducting research work. What is to be accomplished with these facilities is, as we shall show, wholly the concern and responsibility of the AEC. The contract specifically provides that Carbide warrants no results and is not in any way responsible for the success or failure of the operations

at Oak Ridge. It is paid a monthly fee for doing what it is told to do, and both the contract and the understanding of the parties indicate that there are few, if any, aspects of Carbide's operations which are not subject to AEC control. However, it is Carbide which performs the day-to-day functions at Oak Ridge, and Carbide gives the direct instructions to the 14,000 employees whose services it directs.

As we shall show, Carbide operates in much the same way as an employee of the government. A typical employment relationship is characterized by the following factors: The employee does not own the property he uses; has no right to decide what use is to be made of this property; performs those duties which he is directed to perform; performs them in any way directed by the employer; takes no risk of loss; enjoys no prospect of gain beyond the payment for his services; promises nothing in the way of results beyond his best efforts; can have his employment terminated on short notice by the employer; and is subject to changes in his duties at the command of the employer. All these characteristics are, as we shall now show, true of Carbide's relationship with the AEC. We believe that the picture presented by this record demonstrates with unusual clarity that Carbide had no greater beneficial use of the government property at Oak Ridge than anyone paid simply for employment services.

b. Carbide's duties, responsibilities, and rewards

Carbide's duties, as described in the contract, were "to manage, operate and maintain [the Oak Ridge]

plants and facilities, and to perform * * * work and services, upon the terms and conditions [which the contract] provided and in accordance with such directions and instructions not inconsistent with this contract which the Commission may deem necessary or give to the Corporation from time to time." (R. 428–429.) The manager of Oak Ridge operations, on behalf of the AEC, testified that a contractor such as Carbide "performs those functions that are assigned to him from time to time by the AEC and in accordance with the specifications and in many cases the exact procedures established by the AEC." (R. 94.) His work "is a part of the Commission's overall operation and is conducted as if it [were] conducted by the Commission itself as one of [its] branch offices." (R. 103.) Carbide's vice president in charge of its Oak Ridge operations testified to the same effect—that what Carbide did, it did at the direction of the AEC and because it was told by the AEC to perform those tasks. See, *e.g.*, R. 235–237. The primary job that Carbide accomplished was the processing of nuclear materials in amounts, and according to procedures, established and supervised by the AEC.

Like any party paid merely for the performance of its services, Carbide assumed no responsibility for the adequacy or success of the results obtained at Oak Ridge. The contract specifically provides that, absent wilful misconduct, Carbide was not responsible or liable for any failure or delay in the performance of the contract or for the loss or destruction of any property used at Oak Ridge. Carbide promised only its best

efforts and did not warrant that the plants could be successfully operated. (R. 449–450.) The AEC manager at Oak Ridge also testified that the AEC retains the sole responsibility for getting the work done at Oak Ridge. Carbide is simply hired to assist in performing this task. (R. 196.)

Carbide's only reward from its contract with the AEC was the fixed fee of approximately $230,000 a month which it received for its services. (R. 274, 437, 442.) It had no economic interest in the products processed or produced at Oak Ridge. These were at all times owned and retained by the United States Government. (R. 107, 267, 277.) The limited sales that Carbide made were always as agent for the AEC which specifically approved them, and the proceeds were deposited in a Government Fund Account. (R. 487, 490, 145.) That Carbide was paid only for its services is confirmed by the fact that the government could terminate the contract at any time with thirty days' notice, and Carbide would, in that event, be entitled merely to be paid its monthly fee up through the month of termination. (R. 447–448.)

Like any party paid for its services, while Carbide had no prospect of gain from the success of operations at Oak Ridge, it was to be reimbursed for any loss by the government, which alone enjoyed the benefits of the operation. (R. 439.) Indeed, Carbide did not even use its own funds at Oak Ridge, but spent government money under government supervision. (R. 443–444.)

c. The control of Carbide's activities exercised by the AEC

It is difficult to exaggerate the extent to which the AEC reserved the right to control the activities of Carbide at Oak Ridge.

Operations. The AEC set the rates of production and established the allocation of materials at Oak Ridge. (R. 277.) It determined when equipment was obsolete and should be replaced and when plants should be shut down. (R. 277.) It defined the processes to be used in performing the functions entrusted to Carbide (R. 120) and the subjects of the research and development it was to undertake (R. 154). The AEC reserved and exercised the right to makes changes in Carbide's assignments on a day-to-day basis; Carbide could not itself change its mode of operation without the approval of the AEC. (R. 101, 237, 451.) Changes in Carbide's assignments by the AEC were indeed an assumed part of the relationship with Carbide, and Carbide was not in general entitled to any change in its monthly fee because of the change in assignments. (R. 103, 153.) Carbide had no right to specify or control the use it was to make of the government property at Oak Ridge; it was to do with this property what the government instructed it to do.

Handling of property. The government's control over the procurement, management, and sales of government property was equally extensive. Many procurement contracts required initial government approval. These include contracts involving the expenditure of over $100,000 and those made on a "time

and material" basis (R. 208–209, 287, 457). The AEC itself performed the most important type of procurement—that of electric power for Oak Ridge. (R. 121–122.) Beyond this, every procurement contract executed by Carbide was made under procedures specified by the AEC and was subject to detailed audits by the AEC. (R. 264–265.) The Tennessee Supreme Court found that Carbide was the agent of the United States in its procurement activities and it is undisputed that all the property that Carbide bought was at all times the property of the United States and was never subject to Carbide's personal use or control. (R. 450.)

The AEC also controlled the management of property in Carbide's hands establishing, for example, various inventory, storage, safety, and security requirements. (R. 211, 214, 220–221.) Carbide was authorized to make sales of certain scrap materials and obsolete equipment on behalf of the AEC, but these sales and the attendant handling, transportation, and billing were all closely supervised by the Commission. (R. 145, 218, 266–270, 467.)

Personnel. It was only in the handling of personnel that Carbide exercised any appreciable control. As a matter of practice, the immediate directions to the 14,000 employees under Carbide's supervision were given only by Carbide officials. (R. 159–160.) The lower-level AEC representatives supervising the work at Oak Ridge could suggest changes to their counterparts in the Carbide organization, but could only require changes through the medium of a direction

from the responsible AEC officials to the supervisory authorities in Carbide. (R. 145–148, 279, 281, 291.) Personnel were, moreover, in general hired by Carbide and were not employees of the government. (R. 158, 435.)

However, the AEC reserved and exercised substantial control even as to Carbide's personnel policies. It could require Carbide to fire any employee it regarded as incompetent. The approval of the AEC was obtained for salary scales, merit increases, and overtime. (R. 198–199, 202, 238, 260.) Even the collective bargaining agreements executed by Carbide were subject to AEC approval. (R. 288.) The same was often true of other details of Carbide's relationship with its employees. See R. 262–263.

d. Methods of control and supervision

The AEC's control of Carbide's use of government property was assured by a number of overlapping devices which made effective and reinforced its reserved power to give specific directions to the contractor. (R. 236–237.) AEC employees maintained daily supervision of Carbide's work. (R. 109.) The AEC also maintained a constant check upon Carbide's activities through careful control of allowable costs (R. 242, 254), control of budget authorizations (R. 195–196, 236), requirements for specific approval of particular activities or procurements, and periodic audits of Carbide's operations (R. 116–117, 279). See also R. 242, 243, testimony of Clark E. Center, vice president of Carbide in charge of operations at Oak Ridge.

e. Conclusion

In sum, Carbide's use of the government property in this case was solely on behalf of the government, subject to elaborate government controls, and without any possibility of personal benefit from this use beyond the payment for its services. Like Du Pont in the *Livingston* case, Carbide's method of operation and relationship to the government and its property are indistinguishable, except in the magnitude of its functioning, from those of any person paid merely for his services.

These considerations control the present case, as they did *Livingston*. Unlike the contractors in the Michigan cases and unlike the private contractor in *Curry* v. *United States*, 314 U.S. 14, Carbide was paid for its time and services, not for selling the tangible results of use of government property. Its monthly fee was in no sense a function of the value of the products produced at Oak Ridge, much less a function of the value of the property it uses. The resulting arbitrariness of taxing Carbide on the value of the property it used on behalf of the United States makes the State's contention that it is taxing Carbide, not the United States, little short of whimsical. The United States pays Carbide the full value of its services—what any private company would pay for the same services—yet the annual Tennessee tax asserted on Carbide's "beneficial use" of government property approaches the amount Carbide is paid.

2. *Ferguson did not enjoy the beneficial use of government property*

a. Introduction

The relationship of Ferguson to the AEC is set forth in the contract which appears at pages 479 to 514 of the record and in the excerpts from testimony which appear at pages 301 to 346. As the court below noted, in many respects the terms and operation of the AEC contracts with Carbide and Ferguson are identical. Both were considered integrated contractors by the AEC, *i.e.*, each was intended to function as an arm of the AEC.

Ferguson was hired to perform miscellaneous construction work, the detail and scope of which was not known and could not be defined at the time the contract was executed. (R. 307, 309, 330–331.) As the court below found (R. 35), "[s]uch a contract was necessitated by the rapidly changing needs for modifications of the facilities at Oak Ridge that required construction on short notice and adaptability to changes even during the course of a particular construction job." This work consisted principally of alterations of existing structures, although it also required some new construction work. Typically, it might involve the installation or rearrangement of heavy machinery and equipment; or the installation of electrical, heating, ventilating and process systems and connections; or stripping the interior of buildings. Sometimes, only part of a building would be involved and care had to be exercised not to interrupt AEC's operations in the other part. In general,

the work was such that it could not be advertised for bidding because it could not be accurately described in advance and had to be performed quickly, thus preventing the preparation of definitive plans and specifications. (R. 371–374.)

b. Ferguson's duties, responsibilities, and rewards

Ferguson was hired to do whatever construction work the AEC required at any particular time. Specifications and plans were changed frequently, and Ferguson could be required at any time to stop work on one job and begin working on another job with a higher priority. (R. 309, 385.) Unlike the construction contractors doing occasional work at Oak Ridge, Ferguson was not merely charged with obtaining a result specified by a preexisting contract. (R. 366.) It was rather to perform work on a day-to-day basis in precisely the way the AEC directed. (R. 386, 481.) In performing this work, Ferguson was not even to use its own property, funds, or credit. (R. 311, 324–325.)

Ferguson's contract differed from Carbide's in the method of determining the fee for its services. Carbide was paid on a regular monthly basis. Because the amount of work to be performed by Ferguson was highly irregular and could easily fluctuate in amount, it was contemplated that every six months the AEC and Ferguson would agree on a fee for its services, to be determined on the basis of the cost of the work it was performing. That cost figures were used only to estimate the value of Ferguson's services is established by the fact that adjustments in

Ferguson's fee to reflect changes in the government's directions for work to be performed were to be made on an equitable basis to reflect a change in the amount or character of the work authorized. (R. 387, 481.)

c. The control of Ferguson's activities exercised by the AEC

There is no room for doubt, on the present record, that the AEC retained the right and power to control every aspect of Ferguson's work at Oak Ridge. (R. 338–339.) The AEC could tell Ferguson that it was employing too many men on a particular job, that certain men should be transferred to another job, that it should perform its work in a different way for greater efficiency, or presumably impose any other changes and requirements it saw fit. (R. 355, 364, 375–376, 386.) It could tell the contractor to stop work on one job and begin work on another (R. 385) and could impose such safety requirements as it thought necessary. (R. 326.) Ferguson was required to keep detailed records in accordance with the Commission's instructions on behalf of the government, which was to own these records. (R. 390–391.)

Ferguson's handling of property was subject to equal control. Materials used in the work were procured by Ferguson only upon specific authorization or instructions from the AEC. Sometimes, when long-range planning showed the need, Ferguson was directed to procure specialized items even before it was instructed to proceed with the field work. (R. 381, 384–385.) The court below stated that the Ferguson contract appeared to be in every respect identical with that of Carbide in regard to the procure-

ment of materials and concluded that Ferguson was a purchasing agent for the AEC. (R. 42, 43, 52.) The Commission exercised substantial controls over Ferguson's handling of inventories (R. 325, 385) and use of subcontracts (R. 399, 402). The amount of equipment that Ferguson was to use was ultimately determined by the AEC, and the AEC alone bore the risk of loss to any of the equipment. (R. 345, 495.)

The Commission also retained substantial control over the personnel employed by Ferguson. The number of non-manual personnel used by the contractor and their experience and qualifications were subject to Commission approval. (R. 318, 395.) To a lesser degree, the same was true of construction workers. (R. 318.) Non-manual employees could not be employed or discharged without the Commission's permission, and the Commission could require the discharge of any employee it felt was incompetent. The salaries and overtime of employees were controlled by the Commission, as in the case of Carbide. (R. 313, 343, 356.) Even Ferguson's collective bargaining agreement was subject to the approval of the Commission. (R. 365.)

d. Methods of control and supervision

As in the case of Carbide, the Commission's right to control Ferguson's actions was effectuated in a number of ways. Ferguson's activities, like Carbide's, were of course governed by the policies and procedures outlined in the AEC Manual. (R. 315.) In addition, Ferguson prepared manuals, patterned after that of

the AEC, which it was required to follow after they were approved by the AEC. (R. 316–317, 391.) Mr. Bonnet, who served as AEC administrator of the Ferguson contract, had a staff of fourteen engineers who constantly followed Ferguson's performance. They were assigned to specific jobs and spent more than one-half their time in the field checking on the progress of the work, the desirability of the methods Ferguson was using in performing its assignments, and whether the number of men engaged in particular work was more or less than adequate. The AEC representatives discussed details with Ferguson's representatives, exchanged views, and made suggestions. Bonnet was the final authority in all matters and, if necessary, issued formal instructions. (R. 338–339, 368–369, 374–375.) Beyond this, the Commission's direct controls were supplemented by its control of funds and its right to refuse to pay improperly incurred costs. (R. 316, 395.)

C. CARBIDE AND FERGUSON WERE SERVANTS OF THE UNITED STATES

Even if, contrary to our primary contention, the existence of tax immunity turns upon whether the party taxed for use of government property is an independent contractor or a servant, the record in this case shows that Carbide and Ferguson were, in agency terms, servants rather than independent contractors in the performance of their contracts.[1] This Court decides itself the facts and conclusions upon

[1] In *Mahoney* v. *United States*, 216 F. Supp. 533 (E.D. Tenn.), an action under the Federal Tort Claims Act by a Carbide employee, the district court held, contrary to the government's contention, that Carbide was an independent con-

which the constitutional issue turns. *Kern-Limerick, Inc.* v. *Scurlock, supra*, p. 37, 347 U.S. at 121–122; *United States* v. *Allegheny County, supra*, p. 23. Carbide and Ferguson were, as we have shown, required to follow detailed directives and procedures prescribed by the AEC and they were subjected to daily control and supervision by AEC personnel in both broad and specific areas of operation and administration (pp. 42–45, 48–50, *supra*). That the Atomic Energy Commission deemed it appropriate to rely upon the technical and managerial skill of these contractors and frequently issued directions in terms of results rather than of means to these results, does not negate an agency relationship. The most significant factor in determining the existence of any agency relationship is not the principal's actual control (which was, in any event, considerable in this case) but its retention of the right to control the detailed aspects of the servant's duties. There is no doubt on the present record that the Atomic

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tractor. The plaintiff was therefore permitted to sue the United States as a third-party tort-feasor and was not limited to his workmen's compensation remedies. The case was subsequently decided in favor of the government on the merits and an appeal by the plaintiff is now pending.

In *Powell* v. *U.S. Cartridge Company*, 339 U.S. 497, this Court held that the employees of a contractor using government property to manufacture goods which it sells to the United States were not employees of the United States for purposes of the Fair Labor Standards Act. The subsidiary holding that the contractors in that case were not themselves employees of the United States within the meaning of the Act is not inconsistent with our contention that Carbide and Ferguson are servants of the United States for purposes of immunity from a tax on their use of government property.

Energy Commission retained the right to control such aspects of the operations of Carbide and Ferguson.

CONCLUSION

Carbide and Ferguson enjoyed only the benefits of payment for their services; the taxable benefits of use of government plant, materials, and equipment were enjoyed solely by the United States. Any tax on their use of this property is, therefore, an unconstitutional tax upon the United States. The judgments of the court below sustaining the State use tax should be reversed.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
LOUIS F. OBERDORFER,
Assistant Attorney General.
PHILIP B. HEYMANN,
Assistant to the Solicitor General.
I. HENRY KUTZ,
GEORGE F. LYNCH,
Attorneys.

JOSEPH F. HENNESSEY,
General Counsel,
CHARLES W. HILL,
Chief Counsel, Oak Ridge Operations Office, Atomic Energy Commission.
JACKSON C. KRAMER,
R. R. KRAMER,
904 Burwell Building, Knoxville, Tennessee, Attorneys for Union Carbide Corporation and the H. K. Ferguson Company.

MARCH 1964.

APPENDIX

Tennessee Retailers' Sales Tax Act, 12 Tennessee Code Annotated (Official ed. and 1963 Cum. Supp.):

67–3001. Short title—Additional tax.—This chapter shall be known as the "Retailers' Sales Tax Act" and the tax imposed by this chapter shall be in addition to all other privilege taxes.

67–3002. Definition of terms.—The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except when the context clearly indicates a different meaning:

* * * * *

(h) "Use" means and includes the exercise of any right or power over tangible personal property incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business.

* * * * *

(l) "Tangible personal property" means and includes personal property, which may be seen, weighed, measured, felt, or touched, or is in any other manner perceptible to the senses. The term "tangible personal property" shall not include stocks, bonds, notes, insurance, or other obligations or securities.

* * * * *

67–3003. Levy of tax—Rate.—It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, or who uses or consumes in this state any item or article of tangible personal property as defined in this chapter, irrespective of the ownership thereof

or any tax immunity which may be enjoyed by the owner thereof, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined in this chapter, or who leases or rents such property, either as lessor or lessee, within the state of Tennessee. For the exercise of said privilege, a tax is levied as follows:

(a) At the rate of three per cent (3%) of the sales price of each item or article of tangible personal property when sold at retail in this state; the tax to be computed on gross sales for the purpose of remitting the amount of tax due the state, and to include each and every retail sale.

(b) At the rate of three per cent (3%) of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state; provided there shall be no duplication of the tax.

(c) At the rate of three per cent (3%) of the gross proceeds derived from the lease or rental of tangible personal property, as defined herein, where the lease or rental of such property is an established business, or part of an established business, or the same is incidental or germane to said business.

(d) At the rate of three per cent (3%) of the monthly lease or rental price paid by lessee or renter, or contracted or agreed to be paid by lessee or renter, to the owner of the tangible personal property.

(e) At the rate of three per cent (3%) of the gross charge for all services taxable under this chapter.

(f) The said tax shall be collected from the dealer as defined herein and paid at the time and in the manner as hereinafter provided.

(g) Notwithstanding other provisions of this chapter, tax at the rate of one per cent (1%) shall be imposed on machinery for new and expanded industry as hereinbefore defined in this chapter.

* * * * *

67–3004. Application of property by contractor.—

* * * * *

Where a contractor or subcontractor hereinafter defined as a dealer, uses tangible personal property in the performance of his contract, or to fulfill contract or subcontract obligations, whether the title to such property be in the contractor, subcontractor, contractee, subcontractee, or any other person, or whether the title holder of such property would be subject to pay the sales or use tax, except where the title holder is a church and the tangible personal property is for church construction, such contractor or subcontractor shall pay a tax at the rate prescribed by § 67–3003 measured by the purchase price or fair market value of such property, whichever is greater, unless such property has been previously subjected to a sales or use tax, and the tax due thereon has been paid.

* * * * *

Provided, further, that the tax imposed by this section or by any other provision of this chapter, as amended shall have no application with respect to the use by, or the sale to, a contractor or subcontractor of atomic weapon parts, source materials, special nuclear materials and by-product materials, all as defined by the atomic energy act of 1954, or with respect to such other materials as would be excluded from taxation as industrial materials under paragraph (c)2 of § 67–3002 when the items referred to in this proviso are sold or leased to a contractor or subcontractor for use

in, or experimental work in connection with, the manufacturing processes for or on behalf of the atomic energy commission or when any of such items are used by a contractor or subcontractor in such experimental work or manufacturing processes.

* * * * *

Provided further, that notwithstanding § 67–3018, no sales or use tax shall be payable on account of any direct sale or lease of tangible personal property or services to the United States, or any agency thereof created by congress, for consumption or use directly by it through its own government employees.

67–3005. Use tax on imports.—On all tangible personal property imported, or caused to be imported from other states or foreign country, and used by him, the "dealer" as defined in § 67–3017, shall pay the tax imposed by this chapter on all articles of tangible personal property so imported and used, the same as if the said articles had been sold at retail for use or consumption in this state. For the purposes of this chapter, the use, or consumption, or distribution, or storage to be used or consumed in this state of tangible personal property shall each be equivalent to a sale at retail, and the tax shall thereupon immediately levy and be collected in the manner provided herein, provided there shall be no duplication of the tax in any event.

* * * * *

67–3016. Collection from dealers.—The aforesaid tax at the rate of three per cent (3%) of the retail sales price, as of the moment of sale, or three per cent (3%) of the cost price, as of the moment of purchase, as the case may be, shall be collectible from all persons, as defined in § 67–3002, engaged as dealers, as defined in § 67–3017, in the sale at retail, the use, the consumption, the distribution, and the stor-

age for use or consumption in this state, of tangible personal property, or in the furnishing of any of the things or services taxable under this chapter.

67–3017. "Dealer" defined.—

* * * * * *

The term "dealer" is further defined to mean any person who uses tangible personal property, whether the title to such property is in him or some other entity, and whether or not such other entity is required to pay a sales or use tax, in the performance of his contract or to fulfill his contract obligations, unless such property has previously been subjected to a sales or use tax, and the tax due thereon has been paid.

67–3018. Collection of tax from purchaser—Payment by dealer.—Every "dealer" making sales, whether within or outside the state, of tangible personal property, for distribution, storage, use, or other consumption in this state, or furnishing any of the things or services taxable under this chapter, shall be liable for the tax imposed by this chapter. In event said tax cannot be passed on to the purchaser or consumer because of the Constitution of the United States or any act of congress, the tax nevertheless shall be paid by the dealer.

U.S. GOVERNMENT PRINTING OFFICE

REPLY BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1963.

No. 185.

UNITED STATES OF AMERICA and UNION CARBIDE CORPORATION,
Appellants,
v.
B. J. BOYD, Commissioner,
and
UNITED STATES OF AMERICA and THE H. K. FERGUSON COMPANY,
Appellants,
v.
B. J. BOYD, Commissioner.

On Appeal from the Supreme Court of the State of Tennessee.

REPLY BRIEF OF APPELLEE.

GEORGE F. McCANLESS,
Attorney General, State of Tennessee,
MILTON P. RICE,
Assistant Attorney General,
WALKER T. TIPTON,
Assistant Attorney General.

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Cases Cited.

Statutes and Rules Cited.

Miscellaneous Cited.

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On Appeal from the Supreme Court of the State of Tennessee.

REPLY BRIEF OF APPELLEE.

QUESTION PRESENTED.

These cases present the question of whether appellant contractors, who are so-called "cost-type integrated contractors" with the United States Atomic Energy Commission, are liable for Tennessee sales or use taxes from and after May 1, 1955 with respect to their uses of government owned tangible personal property in the performance of their contracts.

STATEMENT.

Appellant Union Carbide Corporation (hereinafter referred to as Carbide) is a New York corporation operating in Tennessee under a cost-plus-a-fixed-fee type management contract with the Atomic Energy Commission (hereinafter referred to as AEC), said contract being designated as W-7403-Eng-26 (R. 1, 17, 427-478). Appellant H. K. Ferguson Company (hereinafter referred to as Ferguson) is an Ohio corporation operating in Tennessee under a cost-plus-a-fixed-fee type construction contract with AEC, said contract being designated as AT-(40-1)-2014 (R. 58, 73-74, 479-514). Both Carbide and Ferguson operate at the AEC installation at Oak Ridge (R. 2, 17, 59, 73).

Appellee was at the time this controversy arose the duly appointed, qualified and acting Commissioner of Finance and Taxation of Tennessee (R. 2, 17, 59, 73). He has since been succeeded in that capacity by Alfred T. MacFarland, who has in turn been succeeded by G. Hilton Butler, who has in turn been succeeded by Donald R. King. The title of the office held by appellee has since been changed to Commissioner of Revenue (§§ 4-301, 4-302, T. C. A.).

Carbide's undertaking under its contract is to manage, operate and maintain for AEC the plants and facilities of AEC, utilizing the property, information and funds of AEC (R. 428). Carbide's operations encompass five fields —administration, operations, research, development and engineering (R. 235). The more specific objectives of the operations are the development and manufacture of nuclear products, and the development of processes and techniques for manufacturing and utilizing nuclear products through study and experimentation (R. 429-437). Carbide, in the fulfillment of its contract, also conducts research into the fields of chemistry, physics, metallurgy, engineer-

ing, nuclear engineering, biology, health physics, waste disposal, reactor concepts and measurement of physical nuclear constants (R. 280). For these purposes great quantities of materials are required (R. 111). Most of these are procured by Carbide, but some are furnished to it by AEC from government stockpiles, and others are acquired for it by the government (R. 216, 235, 529).

The procurements and receipts of tangible personal property by Carbide for the period involved in this suit included pneumatic impact wrenches, roof plugs, miscellaneous scientific equipment, nozzles and dichlorotetrafluorethane obtained on Carbide order forms from in-state and out-of-state vendors; petroleum gas and coal obtained upon AEC order forms from Tennessee vendors; calculating machines and photographic materials obtained under federal supply contracts on Carbide order forms; and an electric clock procured by a Carbide order form from the General Services Administration (R. 528-533).

AEC supervises Carbide's activities by regular consultation with Carbide's top-level supervisory officials (R. 278-281). The day-to-day operation in all phases however is conducted by Carbide's own employees under Carbide's own supervisory personnel (R. 278-281).

The Oak Ridge operation is carried on by one specially constituted division of the corporation, the so-called Union Carbide Nuclear Company (R. 180, 295). The corporation otherwise engages throughout the United States in the manufacture of gases, welding equipment, electrodes for electrical furnaces, movie cameras, flashlight batteries, hearing aid batteries, proximity fuse batteries and other types of such equipment; synthetic, organic, allogenic and aromatic chemicals; various plastics, such as polyenthylene, vinyls, bakelite phenolics and epoxy resins; and metals such as tungsten, vanadium, molybdenum, copper and scandium, as well as alloys for use in the steel in-

dustry, such as ferro silicone, ferro chrome and ferro vanadium (R. 282). The corporation also operates mills and mines in Colorado and Wyoming, which it owns and operates with its own funds, and from which it produces uranium which it sells to AEC at a unit price (R. 246). It likewise sells to AEC at a unit price industrial gases such as oxygen and nitrogen from Linde Air Products Company, another of Carbide's divisions (R. 271).

Carbide, one of the largest private corporations in the United States, occupies a prominent place in the fields of chemistry and physics, and had acquired a wealth of experience therein at the time this country commenced to develop atomic energy (R. 283). It had prior thereto done some nuclear research and produced small amounts of uranium (R. 284).

Carbide has drawn numerous personnel from its other operating divisions into its AEC project and continues to do so. It has likewise transferred an even greater number of employees from its nuclear (AEC) division to its other operating divisions (R. 284-286). Additionally, Carbide has a continuing arrangement for exchange of consulting services between its AEC undertaking and its purely private operating divisions (R. 285). No AEC approval is necessary in the latter case (R. 285). The experience gained by employees at Oak Ridge is admitted to be of value to Carbide in its non-AEC operations (R. 286). Carbide privately, out of its own funds, provides many scholarships for promising students in chemistry and physics at universities throughout the country (R. 287). Considerable numbers of persons trained at Carbide's Oak Ridge facilities leave Carbide's employ to accept employment in other private industries and in the teaching profession (R. 286).

Carbide has operated at Oak Ridge virtually since the inception of the atomic energy program, initially under

the Manhattan District of the U. S. Engineers (R. 283). When the AEC came into being in 1946, the present contract was renewed as between Carbide and AEC whereby Carbide, or its subsidiaries, assumed the management and operation of the atomic energy facilities at Oak Ridge and elsewhere which contract has been amended from time to time (R. 3-4, 17-18, 427-478). The contract calls for close cooperation between management personnel of Carbide and AEC (R. 428-436). AEC maintains a staff of supervisory personnel on the scene at Oak Ridge (R. 104). Major policy changes and major procurements require AEC approval (R. 456-457). The routine day-to-day operation is however under Carbide's supervision (R. 278-281).

The contract between Carbide and AEC has been revised many times since its initial execution (R. 126-161). In all particulars material to this controversy, however, it is the same as it was in 1947. The operating relationship between the parties is admitted to be the same today as it was in 1947 (R. 127, 162, 275, 288-289).

Carbide was a party to previous litigation with the Tennessee Department of Revenue (then Finance and Taxation), during the years 1947-51, wherein it contended that it was not subject to the Tennessee sales and use taxes respecting its procurements of its contract. Its claim was predicated on two grounds—(1) that it was an agent of the U. S. government and impliedly exempt from state taxation, and (2) that Sec. 9 (b) of the Atomic Energy Act afforded it express statutory exemption. The Supreme Court of Tennessee held in **Carbide and Carbon Chemical Corp. v. Carson,** 192 Tenn. 150, 239 S. W. (2d) 27, that Carbide was not an agent but an independent contractor, but further held that it was exempt under the aforesaid Sec. 9 (b). This court affirmed, 342 U. S. 232, 96 L. Ed. 257 (1952).

In 1953, Congress repealed the language of Sec. 9 (b) which had been held to afford exemption to AEC contractors (67 Stat. 575, P. L. 83-262).

As consideration for its contract with AEC. Carbide receives $229,250.00 per month, or $2,751,000 per year (R. 437).

Ferguson's construction contract calls for it to furnish materials, equipment and services, except such as are furnished by the government, required in connection with miscellaneous construction projects at Oak Ridge, both new work and repairs and alterations to existing structures and facilities (R. 480). Said work is generally situated in areas where it must be accomplished under precise scheduling and with minimal interference with operations (R. 480). Ferguson's work is that which is of such character that completed plans and specifications cannot be obtained, and are subject to frequent changes (R. 309). Where detailed plans and specifications are feasible, such work is let by either AEC or Carbide upon sealed bids and a unit price or lump sum basis (R. 310).

Ferguson does not operate with its own funds, rather with funds made available to it by AEC but charged to the operating budget of Carbide (R. 313). These funds are advanced periodically upon the basis of estimates submitted to AEC (R. 312-313). Ferguson's expenditures of such funds are subject to audit constantly, and are subjected to general audit annually (R. 317-318).

Ferguson operates on a nation-wide scale, and is a subsidiary of another large contracting concern, the Morrison-Knudson Corp., of Omaha, Nebraska (R. 339-358). It specializes in building construction, particularly in the industrial and chemical fields (R. 358). On occasion during the past twenty years, it has done large amounts of work for governmental agencies (R. 358). In

1960, it was engaged in two other government projects besides the Oak Ridge one (R. 358).

At Oak Ridge, Ferguson maintains approximately 70 non-manual salaried personnel (R. 359). The number of manual employees varies with the work load, and has ranged between 125 and 1,500 (R. 355). Salaries of non-manual personnel are approved by AEC (R. 395). Wages of manual employees are according to the scale prevalent in the area (R. 425-426). Employment or discharge of non-manual personnel requires AEC approval (R. 355, 479-514). Wages and salaries are paid by Ferguson checks, although disbursements are from government account (R. 363-364).

Prior to the execution of the contract between Ferguson and AEC, the functions agreed to be performed by Ferguson were carried on by other private contractors engaged at the time on specific projects in the AEC area (R. 355-356). AEC has never maintained on its own payroll craftsmen or artisans essential for the maintenance, repair and alteration of its facilities (R. 421-422).

All Ferguson manual employees work under the direct supervision of Ferguson's supervisory personnel, and not those of AEC (R. 423-424). AEC does keep on hand field engineers who maintain close liason with Ferguson's supervisors (R. 424).

All matters of negotiations with trade unions and the working out of details of collective bargaining agreements are carried on by Ferguson (R. 424-426). AEC's participation is confined to approval of the final agreement (R. 426).

In the course of performing its contract with AEC, Ferguson, like any other construction contractor, uses great quantities of materials, including common building materials such as lumber, bricks, concrete blocks, cement

and nails (R. 353-354). Some of these are procured from local vendors, while others may have to be ordered from points throughout the United States (R. 354). Some of the materials used by Ferguson are drawn from government surplus (R. 354). Supplies purchased by Ferguson from private vendors are upon purchase orders providing that title pass to the government upon delivery and that payment therefor will be made out of government funds (R. 538-542).

Ferguson's fixed fee is determinable periodically by negotiation and reference to the cost of work done (R. 387, 481).

The instant litigation represents a test case with respect to the liability of AEC cost-type prime contractors for Tennessee sales or use taxation measured by the sales price, cost price or fair market value of tangible personal property used by them in the consummation of their contracts, in the absence of any act of Congress exempting them from such taxation.

Appellee and his predecessors by agreement with representatives of appellants, caused to be issued to Carbide and Ferguson resale certificate under Rule 68 (d) of the Sales and Use Tax Rules and Regulations, thereby enabling them to make purchases from Tennessee vendors free of the sales tax, with the understanding that the vendees would pay to the State any tax found to be due (R. 532, 542). All procurements from Tennessee vendors were made upon these certificates (R. 532, 542). No assertion is made that any sales or use tax is owed with respect to property constituting "industrial materials" within the meaning of Sec. 67-3002, T. C. A., or property acquired outside Tennessee by AEC personnel and furnished to AEC contractors where title to such property vests in the government prior to its entry into this state in interstate commerce (R. 532-533, 542-543).

On April 30, 1958, Carbide paid to appellee involuntarily and under protest the sum of $71,376.36 representing sales or use taxes with respect to tangible personal property procured or used by it under its contract during the test period (R. 7, 19). On the same date Ferguson paid the sum of $12,107.52 under the same conditions and for similar reason (R. 64, 75). Within thirty days thereafter each instituted its suit to recover the amount so paid.

The cases were heard and determined in the trial court upon the original bills, the answers, stipulations of fact and depositions of witnesses. The Chancellor, the Honorable Ned Lentz, entered a decree holding appellants liable for the taxes in question and dismissing their bills (R. 29-30). From that decree appellants prosecuted appeals to the Supreme Court of Tennessee. That Court, in an unanimous opinion by Justice White, affirmed the Chancellor's decree dismissing appellants' bills, holding that while appellants were agents of AEC for the purpose of procurement of materials, they were independent contractors as to the general performance of their duties (R. 33-55).

SUMMARY OF THE ARGUMENT.

The instant appeal represents the second consideration by this Court of the broad question of the immunity of AEC's cost-plus a fixed fee contractors from Tennessee's sales and use taxes. Some 12-years ago this Court held that the original Atomic Energy Act contained a statutory exemption broad enough to immunize AEC's contractors as well as AEC itself from state privilege taxation. Shortly thereafter Congress deleted the exempting language from the Atomic Energy Act. Also within 2-years thereafter Tennessee's sales and use tax statute was amended so as to impose the tax with respect to use *per se* of tangible personal property, without regard to the ownership thereof or the taxable status of the owner. Specifically taxed is use of tangible personal property by any contractor in the performance of his contract or the fulfillment of contractual obligations, notwithstanding that title to the property used may be in some other entity.

For the past two decades it has been well settled that nondiscriminatory state taxation of government contractors is permissible, even if it be shown that the burden of such taxes will fall exclusively upon the government. It further seems now to be well settled, in the light of the 1959 Michigan property tax cases, that, while the state may not lay a tax directly upon government owned property, it is not precluded from imposing a tax upon private persons measured by the value of such property where the object of taxation is not the property itself but the privilege of using it.

It is abundantly clear that the Tennessee taxes in question are not imposed upon government owned property, but are imposed upon private parties for the privilege of

using that property for their own personal gain. It is further clear that the Tennessee taxes do not discriminate against federal government contractors, or against AEC contractors, but apply with equal force to all contractors whether they be working for private parties or the government, federal, state, or local.

Contractors with federal agencies do not enjoy any implied constitutional immunity from state taxation. They may be accorded immunity by Congress in the interest of favoring governmental objectives. Congress was held by this Court in the previous case to have legislated immunity for AEC's contractors. Since that case, however, Congress has removed from the atomic energy statute the language held to accord that immunity, leaving AEC's contractors in the same position as government contractors generally so far as state taxation is concerned.

In the previous case this Court did not adjudicate the question of whether AEC's contractors were agents or independent contractors. The Tennessee Supreme Court however in that case held them to be the latter. The instant record indicates that the operating relationship between AEC and its contractors is the same today as it has always been, and as it was at the time the previous case was considered. It is obvious that the congressional framers of the statute repealing the former § 9 (b) of the Atomic Energy Act intended for the effect of said repeal to be the establishment of the right of the states to tax AEC's contractors, notwithstanding AEC's objections that the congressional action would add substantially to AEC's operating costs. AEC's contractors, including appellants herein, presently therefore enjoy no greater tax immunity than do government contractors generally. The latter may be taxed for the exercise of privileges in connection with government owned property where such taxes are nondiscriminatory.

It is no objection to a state tax imposed upon a government contractor that the tax may be measured by the value of property used by him, even though title to said property may be in the government at the time of use. If any doubt persisted with respect to this point after **Alabama v. King & Boozer**, 314 U. S. 1, 86 L. Ed. 3; **Curry v. United States**, 314 U. S. 14, 86 L. Ed. 9, and **Esso Standard Oil Co. v. Evans**, 345 U. S. 495, 97 L. Ed. 1174, there can certainly be none following the Michigan property tax cases decided in 1959 and reported in 355 U. S. (2 L. Ed. (2d)). The Tennessee sales and use taxes herein involved, being predicated upon appellants' use *per se* of tangible personal property in the fulfillment of contracts with AEC, and being paid upon the basis of the purchase or cost price, or fair-market value, of the property used **one time only**, are far less of a burden upon the federal government than were the Michigan taxes which were in practical operation and effect the normal ad valorem property taxes, payable with respect to the full value of property each year the property was possessed and used by the contractor.

The argument pressed by AEC and its contractors in the former case to the effect that AEC's management contractors are agencies or instrumentalities of the United States is not borne out by the record in the instant causes. First, the contracts themselves, though rewritten numerous times since the inception of the AEC undertaking at Oak Ridge, do not attempt to spell out the relationship between AEC and such contractors in agency terms. Appellants Ferguson and Carbide are referred to throughout the respective instruments as "contractor". Secondly, the instruments in question do not undertake to confer upon the private contracting parties any of the perogatives or attributes of sovereign status. Thirdly, in their operations under the contracts, the contractors supervise their

own employees and assume the intended responsibility for conducting the day-to-day operation of the facilities at Oak Ridge within their respective spheres.

So unusual a relationship as agency between a sovereign government and a private person or corporation is not one lightly to be inferred, and the intent to create such a relationship can be expected to be defined in the clearest and most unmistakable terms. While it is conceivable that a large government agency like AEC could undertake to operate the facilities in question through its own government employes, it has obviously been recognized from the beginning that the scope and breadth of the task was such that the skill and experience of American industry, operating in the normal industry pattern, was desirable if not essential to the efficient conduct of the enterprise in question. It has not been an uncommon thing for the government during the past quarter century to call upon American industry to manage and operate its defense facilities. It has been most uncommon however for it to be asserted that industry in performing such tasks did so as a government agency or by so doing acquired immunity to state taxation.

Though AEC has concededly reserved a great deal of control over the Oak Ridge operation, and has engaged in on-the-spot supervision of its contractors at the managerial level, such controls, particularly those of a budgetary, auditing and accounting nature, are commonplace safeguards of the government's fiscal interests, particularly where large expenditures are involved. It is an established doctrine in this country that reservation, even extensive, of the right to control the general progress of the work will not suffice to cast an independent contractor into the role of an agent. This doctrine should apply with increased force when the other contracting party is the government or governmental agency.

While recent cases have upheld a contractor's claim of agency for the purpose of procuring supplies, none has gone so far as to hold that a general agency of a contractor on behalf of the government is to be deduced in the absence of a clearly expressed intent that this be the result. The instant appeals involve no question as to appellant-contractors' status as purchasing agents of AEC. The Tennessee Supreme Court found them to be such. All that is involved here is the claim of the appellant-contractors to be agents of AEC for general purposes in the performance of their contracts and the uses of tangible personal property required in such purpose. The general exercise of appellant-contractors' own skill, care and judgment, negates any suggestion that they are entitled to be regarded as agents in derogation of the taxing power of a concurrent sovereign having jurisdiction over the subject matter.

Appellants advance the contention that, while a state may tax a contractor with the government who has a separate beneficial interest in government property made the measure of the tax, the state cannot tax appellant-contractors inasmuch as they have no such interest in the property used by them at Oak Ridge. Such contention is negated completely when one considers the very substantial amounts which appellant-contractors are paid as consideration for their undertakings. The fact that a contractor receives only a predetermined fixed fee for his services in no sense differentiates him from the contractor who is compensated upon a percentage of costs or a lump-sum basis insofar as one is concerned with the degree of beneficial use which he has in the materials that he erects or applies for his contractee. In one sense no contractor ever has any beneficial interest of his own in the materials which he uses, the ultimate beneficiary being in all cases the contractee. In quite another sense

however every contractor has a well defined interest in and dominion over the goods incorporated into his contract during the pendency of his contract. The essence of any contractor's undertaking is not *per se* the enjoyment of the goods which he uses, but the exercise of his experience, skill and labor in changing their form and evolving something new of an enhanced value. The materials incorporated into the contract are one of the means, or tools for the accomplishment of the desired end. The contractor, no matter how compensated, has a clear interest in those means until the desired result is achieved.

Apart from their substantial fees appellant-contractors have a very real interest in everything incidental to the Oak Ridge undertaking. Appellant Carbide supplies itself, for normal profit motives, some of the essential materials to the project. Its connection with the project affords it very valuable benefits of a tangible nature such as the development and acquisition of new skills and the opportunity to exploit future markets for products of atomic energy. Appellant Ferguson also reaps intangible benefits in the form of experience in a very specialized field of construction.

Nothing, however, in the record suggests that either contractor has been actuated by anything other than normal business motives in undertaking the Oak Ridge assignments. This in and of itself affords a separate beneficial taxable use of government facilities upon which the Tennessee taxes are predicated.

ARGUMENT.

A STATE PRIVILEGE TAX IS NOT INVALIDLY APPLIED MERELY BECAUSE ITS BURDEN WILL FALL UPON THE GOVERNMENT.

During the past quarter of a century there has become firmly established in federal jurisprudence the proposition that a state is not precluded from imposing nondiscriminatory taxes upon private parties who deal with the federal government, notwithstanding the fact that some, or indeed all, of the economic burden of those taxes will be borne ultimately by the government. This principle is so well recognized that no citation of authorities therefor is necessary.

From the inception of this doctrine however there have been recurrent attempts to modify its application to federal contractors in certain areas by undertakings on the part of agencies related to the national defense to cast their contractors in the role of government instrumentalities and thereby impart to them tax immunities enjoyed by the government itself as an attribute of sovereignty. The instant cause represents the second attempt on the part of the AEC to insulate its prime contractors from sales and use taxes imposed by the State of Tennessee. The first culminated favorable to AEC and its contractors when this Court held in **Carson v. Roane-Anderson Co.**, 342 U. S. 232, 96 L. Ed. 257, that Congress had, by the inclusion in the Atomic Energy Act of a provision exempting the property, activities and income of AEC from state taxation, effectually exempted AEC's management contractors from state taxation. Upon Congress' rather prompt action to repeal Sec. 9 (b), AEC and its contractors have proceeded to reassert immunity from the Tennessee sales taxes on behalf of the contractors under the

claim that they enjoy implied constitutional immunity therefrom.

Since this Court's decision in the **Carson** case, supra, Tennessee has extensively amended and broadened its sales tax base. Among other things, the 1955 General Assembly of Tennessee imposed the tax upon use *per se* of tangible personal property. Sec. 67-300, T. C. A.

A. The Tennessee Statute.

The Tennessee sales tax is a privilege tax, imposed upon the privileges of selling, leasing, renting, importing for distribution, storage, use or consumption, and using per se in the performance or fulfillment of a contract, tangible personal property. **Hooten v. Carson**, 186 Tenn. 282, 209 S. W. (2d) 273; **Smoky Mountain Canteen Co. v. Kizer**, 193 Tenn. 598, 247 S. W. (2d) 69; **Broadacre Dairies, Inc. v. Evans**, 193 Tenn. 441, 246 S. W. (2d) 78; **S. M. Lawrence Co. v. MacFarland**, 210 Tenn. 100, 355 S. W. (2d) 100; **U. S. v. Boyd** (the instant case below), 211 Tenn. 139, 363 S. W. (2d) 193.

Whereas the Tennessee sales tax statute as originally enacted in 1947 was a typical sales tax embodying the conventional complementary use tax, the latter designed merely to reach goods imported from without the state for distribution, storage, use or consumption within the state, **Madison Suburban Utility Dist. v. Carson**, 191 Tenn. 300, 232 S. W. (2d) 277, the tax after the 1955 amendments was extended to cover all use of tangible personal property within the state where no tax had previously been paid with respect to such property, including specifically that use by a contractor in the performance of his contract or the fulfillment of contract obligations. Sec. 67-3003, T. C. A.

Appellee would emphasize to the Court that the Tennessee sales tax has no application, and has never been

sought to be applied to sales to or uses by any governmental agency, whether federal, state or local. Sec. 67-3012, T. C. A.; § 67-3008, T. C. A. The latter section in particular provides that

> ". . . no sales or use tax shall be payable on account of any direct sale or lease of tangible personal property . . . to the United States, or any agency thereof created by Congress, for consumption or use directly by it through its own governmental employees."

The tax is therefore applicable only to private persons or firms exercising the taxed privileges. It is not applicable with respect to sales to or uses by any public agency.

B. The Burden Test Is Not Discriminative.

This Court over a quarter century ago determined that a tax levied by a state upon a government contractor on account of work performed for the government, where nondiscriminatory, did not constitute a direct burden upon the government. **James v. Dravo Contracting Co.**, 302 U. S. 134, 82 L. Ed. 155. Barely four years later it held in two cases involving the Alabama sales and use taxes respectively that the government's implied constitutional immunity was not violated by the imposition of the taxes upon a cost-plus type government contractor whose contract called for him to acquire materials to be used in army camp construction with purchases subject to prior government approval and title passing to the government upon delivery. **Alabama v. King & Boozer**, 314 U. S. 1, 86 L. Ed. 3; **Curry v. U. S.**, 314 U. S. 14, 86 L. Ed. 9. In 1953 it upheld the Tennessee gasoline privilege tax as applied to Esso Standard Oil Company on account of that concern's storage and handling of government owned aviation gasoline pursuant to a contract which called for compensation based upon gallonage and containing a provi-

sion for the assumption of liability for all state taxes by the United States Government. **Esso Standard Oil Co. v. Evans,** 345 U. S. 495, 97 L. Ed. 1174.

These decisions without question represented a departure from precedents formerly adhered to. Nothing however in recent history serves to dilute in any way the principle that a showing of the burdensome effect of a tax upon the United States is insufficient to call for the invoking of the doctrine of implied constitutional immunity. In short, the government does not make itself the taxpayer merely by assuming voluntarily to accept the burden of the tax from the contractor.

Indeed, the principle was restated forcefully in the Michigan property tax cases decided in 1958, where an ad valorem property tax, treated by the Court as a privilege tax upon the use of government owned property, was upheld as against a contractor fulfilling a supply contract with the government, and a subcontractor manufacturing and furnishing government owned property to a government prime contractor. **United States v. Township of Muskegon,** 355 U. S. 484, 2 L. Ed. (2d) 436; **Detroit v. Murray Corp.,** 355 U. S. 489, 2 L. Ed. (2d) 441.

It is therefore obvious that the fact of the burden of the Tennessee sales and use taxes falling upon AEC in the instant causes is insufficient to invalidate said taxes under the doctrine of implied constitutional immunity, absent a showing that the tax discriminates against AEC or its contractors.

C. The Tax Does Not Discriminate Against the Government.

Appellants urged in the Court below and suggest here that the Tennessee tax operates to discriminate against the federal government and those who deal with it. Such

suggestion however is wholly without substance when the Tennessee statute is viewed objectively. Two Tennessee Supreme Court cases show that the tax has been applied and sustained as against a contractor with a state agency (a rural electric cooperative) and a municipality. **Townsend Electric Co. v. Evans**, 193 Tenn. 536, 246 S. W. (2d) 967, and **S. M. Lawrence Coal Co. v. MacFarland**, 210 Tenn. 100, 355 S. W. (2d) 100.

Insofar as the federal government is concerned, § 67-3004, T. C. A., as hereinbefore pointed out, specifically spells out the exemption of the United States and its congressionally created agencies wherever direct sales are made to them, or of direct uses by them through their own government employees. Additionally, the said section exempts the sale or use of materials to or by contractors where the materials become a part of an electric generating plant or distribution system operated by any agency of the United States or the State of Tennessee or political subdivision of the State of Tennessee.

Still further, AEC contractors in particular are accorded exemption with respect to "atomic weapon parts, source materials, special nuclear materials, and by-product materials" as defined by the Atomic Energy Act of 1954. Appellee submits that these exemptions clearly negate any possible suggestion of discrimination against federal contractors generally or AEC contractors in particular.

THOUGH CONGRESS MAY IMMUNIZE GOVERNMENT CONTRACTORS FROM STATE TAXATION, SUCH IMMUNITY DOES NOT EXIST IN THE ABSENCE OF CONGRESSIONAL ACTION.

A. The Authority of Congress.

It is not to be doubted that Congress possesses ample authority under the Constitution, if as a matter of policy

it deems such action to be in the interest of the United States, to exempt to the fullest extent from state taxation those who deal with the government, including government contractors. So much by inference was stated in **Curry v. United States**, supra. This Court held in **Carson v. Roane-Anderson Co.**, supra, involving essentially the same facts as in the instant causes, that the Atomic Energy Act of 1947 did express a congressional intent that AEC's management contractors be immunized from state taxation.

An examination of the briefs in the **Carson** case reveals that counsel for the State of Tennessee in that case argued most vigorously to the effect that § 9 (b) of the Atomic Energy Act of 1947 exempting "the commission and the property, activities and income of the commission" did not operate to insulate the activities of AEC's management contractors from state taxes. This Court disagreed with that contention and held that

> "The meaning of 'activities' as applied either to an individual or to a government agency may be broad enough to include what is done through **independent contractors** as well as through agents." (Emphasis supplied.) (342 U. S. at p. 236; 96 L. Ed. at p. 262.)

The Tennessee Supreme Court in that case, though agreeing with this Court's construction of § 9 (b) of the Atomic Energy Act, and holding the contractors to be immune (appellant Carbide being one of the contractors involved in the **Carson** case), had nonetheless held them to be independent contractors and not agents. **Carbide & Carbon Chemicals Corp. v. Carson**, 192 Tenn. 150, 239 S. W. (2d) 27.

Nothing whatever appears from this Court's previous determination of the taxability of AEC management contractors in the **Carson** case which even suggests that this

Court regarded their exemption as resting on anything other than the exempting language found to exist in § 9 (b). To all intents and purposes the basis of the immunity holding was a purely statutory one.

B. **The Congressional Action Following the Carson Case.**

This Court's opinion in **Carson v. Roane-Anderson Co.** was delivered on January 7, 1952. On August 13, 1953 there was enacted by Congress Public Law 83-262, which struck from § 9 (b) of the Atomic Energy Act (42 U. S. C. A., § 1809) the last sentence thereof, reading as follows:

> "The Commission, and the property, activities, and income of the Commission, are hereby expressly exempted from taxation in any manner or form by any State, county, municipality, or any subdivision thereof."

In conjunction with this act of Congress it is useful to make reference to Senate Report No. 694, dated July 28, 1953 (U. S. Code Congressional and Administrative News, 83rd Congress, First Session 1953, pp. 2379 et seq.). Said Senate Report sets forth the purpose and background of said legislation. The first paragraph thereof contains the following statement:

> "The purpose of this legislation is to amend the Atomic Energy Act of 1946, as amended, by striking the last sentence of section 9 (b) thereof which, as interpreted by the courts, affords to the Commission, and its contractors, an exemption from State and local taxation broader in scope than that generally enjoyed by all other departments and agencies of the Federal Government, and to place the Atomic Energy Commission on a basis identical to that of the rest of the Federal Government with respect to such taxation."

The Report refers to this Court's **Carson** decision recognizing immunity in AEC contractors by virtue of the last sentence of § 9 (b), supra, and to the previous decision of this Court in **Alabama v. King & Boozer**, supra, holding that constitutional immunity did not extend to federal contractors but was limited to taxes imposed directly upon the United States. There appears then the following statement:

> "Thus, the Atomic Energy Commission's contractors, by reason of the statutory exemption as interpreted by the Supreme Court, are entitled to an exemption from taxation which is not enjoyed by comparably situated contractors of other agencies and departments."

The Report incorporates, among other things, a statement from the Atomic Energy Commission setting forth its views with respect to the repeal of the 9 (b) exemption. That statement is in the form of a letter from Mr. Lewis L. Strauss, then Chairman of the Atomic Energy Commission, dated July 28, 1953, and addressed to the Hon. W. Sterling Cole, Chairman, Joint Committee on Atomic Energy, Congress of the United States. Among Mr. Strauss's observations relative to the legislation is the following statement:

> "Reducing the Commission's exemption from State and local taxes to the constitutional immunity generally applicable would result in an increase of several million dollars annually in the costs of the atomic energy program in the form of added State and local taxes borne by the Federal Government."

It was thus recognized by AEC in 1953 that the removal of the 9 (b) exemption would enable the states to tax AEC contractors in a manner which had theretofore been foreclosed to them. Notwithstanding the fact however of

recognized added costs to the government, and notwithstanding AEC's opposition to any amendment of the Atomic Energy Act in this area, Congress repealed the 9 (b) exemption.

The question which we cannot avoid in the light of the amendatory act and its background, if there is validity to appellant's position taken in these causes, is why Congress took the trouble to repeal the 9 (b) exemption. If AEC's contractors enjoy implied constitutional immunity to the extent that AEC enjoys such immunity, then a more useless act was never performed by a legislative body than that done by Congress in repealing the statutory exemption held by this Court in the **Carson** case to be applicable to AEC's contractors.

The Senate committee which recommended the amendatory act for passage very clearly felt that by so doing it was placing the AEC contractors in the shoes of the contractors in **Alabama v. King & Boozer.** It is likewise obvious that AEC Chairman, Mr. Strauss, had no doubt but that this would be so, and that the resultant cost to AEC would be "several million dollars annually."

AEC and its contractors have however today come back to court and renewed their insistence that the contractors and AEC are one and inseparable, and that the contractors are entitled to the benefit of AEC's undisputed immunity from state taxation.

It is not suggested that the relationship between AEC and its contractors is today different from that which existed at the time of the **Carson** case. Indeed, this record shows that the instant relationship is the same as the one established at the outset of the atomic energy program. The attention of the Court is invited to the following excerpts from testimony of appellants' witnesses:

(By Mr. Sapirie, Manager, Oak Ridge Operations, AEC.)

"Q. Why was the contract rewritten, Mr. Sapirie, as appears in supplemental contract or Modification No. 37?

A. The rewrite in Mod 37 was intended to reflect more accurately the actual operating relationship between the contractor and the government . . .

Q. Was there in reality any real difference in the method of operation after this Supplemental Agreement No. 37 went into effect than that before?

A. There was no change in method of operation. I think Supplement 37 does a better job of describing the operation as it existed both before and after the date of that modification" (R. 126-127).

(Again by Mr. Sapirie.)

"In adding this last (Article I of Carbide's contract, Supplement No. 37) and revising other language in a contractual document, AEC and Carbide intended to make clear the actual relationship of the parties under this contract as supplemented up to that time. However, it did not change the manner in which we were operating. This is the same type of operation after signing of Supplement 37 as we had before Supplement 37" (R. 162).

(By Mr. Center, Vice President, Union Carbide Nuclear Company.)

"Q. There has been filed in this case as an exhibit the contract between Carbide Corporation and the Atomic Energy Commission which was in force and effect during the period we are especially interested in. I believe the testimony shows that that contract was rewritten in 1955 or 1956. Are you familiar with the rewriting of that contract in general?

A. In general, yes.

Q. And why it was done, why it was then rewritten?

A. Was to bring up to date all the documents we had prior to that time. Also to reflect, oh, the intent or the relationship of the parties. I mean relationship between the Atomic Energy Commission and the Union Carbide.

Q. Was it because of any change or was there a change made as a result of this rewrite of the contract, or did you continue to operate as you had just immediately before?

A. Our operations continues as it always had. There was no change."

(Again by Mr. Center.)

"Q. As you stated, Mr. Center, you have been on the scene at Oak Ridge since 1944, or thereabouts. Is the operating relationship of Carbide to the Atomic Energy Commission any different today from what it was in 1947, or whenever it was the AEC was formed and took over?

A. The relationship is still the same.

Q. It is still identical?

A. Yes, sir."

It is thus established by appellants' own witnesses, and in no wise controverted, that the relationship between AEC and its contractors was unchanged from 1947 until the inception of these suits. If a statutory exemption was required to immunize the contractors from state taxation in 1947, and such exemption was stricken from the law in 1953 against the objections of AEC that the repeal would increase its operating costs by several million dollars, how can it possibly be said that the contractors enjoy constitutional immunity from state taxes imposed upon them in 1955, upon the theory that they are part and parcel of AEC, when the record shows that

the relationship between them is the same as it has always been?

Appellee submits in all earnestness that the action of the Congress of the United States, and the clearly expressed policy and intendment thereof, cannot be so lightly regarded in determining the status of appellant-contractors for purposes of nondiscriminatory state taxation.

A STATE MAY TAX A PRIVATE PARTY FOR THE PRIVILEGE OF USING GOVERNMENT OWNED PROPERTY IN A BUSINESS CONDUCTED FOR PROFIT, AND MEASURE THE TAX BY THE VALUE OF THAT PROPERTY.

A. The Rule Respecting Property Taxation Is Not Applicable.

Appellants cite and rely heavily upon the 1943 opinion of this Court in **United States et al. v. County of Allegheny**, 322 U. S. 174, 88 L. Ed. 209, as supporting their argument that appellants Carbide and Ferguson cannot be taxed with respect to their use of property owned by AEC. Appellee submits that upon analysis that case is found to be authority not for appellants' position but for that of the State of Tennessee.

Appellants' contention brings us face to face with the well-known universally recognized distinctions between ad valorem and privilege taxation, and the wholly different rules as between them.

With respect to ad valorem property taxes, the tax is imposed upon the property itself. The taxing authority looks to the property for the tax and the tax follows the property into the hands of successive owners. The property may be sold in satisfaction of the tax, without regard to any new rights therein acquired by successive

owners. The measure of the tax is the value of the property, and the tax ordinarily recurs each year that the property remains upon the tax rolls.

On the other hand, a privilege tax is not upon specific property, but rather upon the exercise of some state protected right, privilege or franchise. Here the taxing authority looks to the person of the taxpayer exercising the privilege for satisfaction of the tax. The privilege is itself personal and cannot be transferred in the absence of some statutory provision authorizing transfer. No lien attaches to any property as a consequence of the tax until steps are taken for its collection. Such a tax may be measured by anything having reasonable relationship to the activity constituting the privilege, including, but not necessarily limited to the value of specific property.

In striking down the Pennsylvania tax sought to be applied in the **Allegheny County** case, against a government contractor using government owned property in the fulfillment of a war contract, Mr. Justice Jackson, speaking for the Court, was most keenly aware of the fact that the tax sought to be applied was an ad valorem general property tax. He pointedly observed at p. 184 of 322 U. S.:

> "This form of taxation is not regarded primarily as a form of personal taxation but rather as a tax against the property as a thing. Its procedures are more nearly analogous to procedures in rem than those in personam. While personal liability for the tax may be and sometimes is imposed, the power to tax is predicated upon jurisdiction of the property, not upon jurisdiction of the person of the owner, which often is lacking without impairment of the power to tax. In both theory and practice the property is the subject of the tax and stands as security for its payment."

Mr. Justice Jackson further stated at p. 189 of 322 U. S.:

> "We hold that Government-owned property, to the full extent of the Government's interest therein, is immune from taxation, either as against the government itself or as against one who holds it as bailee."

It is the government's **property** then which the Constitution was held to shield from state taxation in the **Allegheny County** case, even if the state expects to collect the tax from a private party. A state cannot lay a tax the incidence of which will fall upon such property and possibly become an encumbrance upon it. As to privilege taxes, laid without discrimination upon private parties dealing with the government, this Court has taken an altogether different view.

B. Privilege Taxes Imposed Upon Private Parties, Though Measured by Government Property Have Been Upheld.

Appellants urge vigorously that the State of Tennessee is without authority to impose upon AEC's contractors a privilege tax having as its measure the value of property titled in the government. This Court however is no stranger to taxes so imposed and measured and has upheld them consistently.

In **Alabama v. King & Boozer**, supra, a sales tax was imposed at the time of acquisition of property title to which passed directly to the government, with the tax being measured by the sales price.

In **Curry v. United States**, supra, companion case to Alabama v. King & Boozer, a use tax was imposed as of the time of acquisition of title by the government, the measure being the purchase price of the property.

In **Esso Standard Oil Co. v. Evans**, supra, a gasoline privilege tax upon storage was imposed with respect to government owned gasoline, and measured by the number of gallons. (Mr. Justice Black pointed out in **United States v. Detroit**, at 2 L. Ed. (2d) 426, that there was no meaningful distinction constitutionally between a tax measured by value of property and one measured by quantity.)

In the Michigan property tax cases, the tax was in effect and ad valorem property tax measured by value of property titled in the government, although it was construed as being upon the privilege of using the property. The significant thing however which cannot be overlooked in considering the Tennessee tax in the cases at bar, was that the Michigan taxes were annual taxes, payable each year that the property remained in the hands of the private party dealing with the government. A heavier burden on account of use of government owned property is difficult to envision.

Most manifestly, if the Michigan contractors could validly be taxed each year with respect to the same government owned property in their hands without offending the Federal Constitution, then it is not at all extravagant to regard as valid the Tennessee taxes, measured by value and collected **one time only.**

Appellants make no argument that the Tennessee taxes are property taxes of the sort denounced in the **Allegheny County** case. They rather appear to be of the opinion that there is no meaningful distinction to be drawn between them when both make reference to the value of government owned property for their measure and the impact of both falls ultimately upon the government. It is submitted, however, by appellee that this Court has not taken such a pragmatic view in the field of intergovernmental immunity. State taxes laid without discrimination

upon private parties dealing with the government have been upheld though measured by the value of government property, and though ultimately paid by the government. On the other hand, state taxes laid directly upon the government or its property have stricken down irrespective of whom the state looked to for their satisfaction. This is no mere technical distinction.

A PARTIAL RESERVATION OF CONTROL BY THE GOVERNMENT DOES NOT TRANSFORM A PRIVATE CONTRACTOR INTO AN AGENT ENTITLED TO SOVEREIGN IMMUNITY.

A. The Contracts Do Not Purport to Create an Agency Relationship.

The essence of appellants' argument in these causes is that the contractors have been, by virtue of the extensive specifications and controls over their undertakings reserved by AEC, effectually constituted agents of AEC and taken completely out of the role of independent contractors. The legal predicates cited for this thesis are the cases of **Kern-Limerick, Inc. v. Scurlock**, 347 U. S. 110, 98 L. Ed. 546, and **Livingston v. United States**, 179 F. Supp. 9, affirmed without opinion, 364 U. S. 281, 4 L. Ed. (2d) 1719.

In determining the relationship between contracting parties one looks first to written instruments evidencing the contract. Both appellants Carbide and Ferguson operate under lengthy written contracts. At no place in either instrument do there appear what could be designated as apt words evidencing any recognition by the contracting parties that the intended relationship of the contractors to AEC is one of agency. **Carbide and Ferguson are referred to throughout their respective instruments as "contractor".**

Appellee of course recognizes the rule that what an agreement is called is not wholly determinative of the relationship created by it. At the same time, the way the parties designate themselves is certainly to be regarded as having considerable significance.

If the parties to these instruments intended that they should constitute Carbide and Ferguson as agents of the government entitled to exercise sovereign perogatives, it would have been quite as easy to designate them specifically as "agents" at it was to call them "contractors". One does not readily escape the fact that these contracts, Carbide's in particular, have been subject to numerous revisions (Carbide's contract in force at the outset of this litigation was the 37th supplement to the basic agreement between AEC and Carbide). It is testified to that Supplement No. 37 was drawn and executed so as to reflect more accurately the actual operating relationship between the contractor and the government (R. 126-127, 162). This was done in 1956, nine years following the commencement of litigation in Tennessee involving the question of liability of AEC's contractors to sales and use taxes, in which litigation AEC and its contractors had always asserted implied constitutional immunity. Is it not reasonable to infer in such circumstances that upon a redraft of the contract agency relationship would have been spelled out in clear and unmistakable terms if the parties had actually intended an agency relationship with all that that term imports?

Nor can it be overlooked that an agency relationship between the government of the United States and a private firm engaged in business for a profit is not a common thing in this country. As a matter of fact precedents for such a thing are few indeed, and appellee is aware of none prior to the state tax litigation in the area of the instant controversy. This is another circumstance which would

normally strongly behoove the parties undertaking to create such a relation to have set it down in the aptest possible terms.

Apart from the matter of nomenclature, the instruments on their face are structured no differently from normal contracts between private parties and governmental agencies. The phraseology is standard. They outline in general terms the scope of the contractor's undertaking and evidence every expectation that he will use his own means and methods to achieve his execution of it. The record bears out the proposition that the contractors do in fact use their own means and methods (R. 279-282).

Nor do the contracts specify that the contractors are to be clothed with any normal attributes of sovereign power or immunity. The contractors are given no rights to impose taxes, exercise police powers or assert the power of eminent domain. They are accorded no immunities from regulation or taxation.

B. The Contractors Have Broad Latitude in the Performance of Their Contracts.

The record amply demonstrates that Carbide operates the plant and facilities of AEC, and that Ferguson performs construction work for AEC very much in the same manner that any private enterprise operates. They differ from purely private undertakings only in that there is constant consultation between the contractors' supervisory personnel and AEC officials stationed at Oak Ridge. Major policy determinations and large procurements (over $100,000 in the case of Carbide, and over $10,000 in the case of Ferguson) are subject to AEC's prior approval. Another difference is that expenses of the operations are paid entirely out of government funds maintained in special bank accounts, subject to strict budgetary auditing and accounting controls. Each contractor however is

free to control its own employees below the management level. These employees, who actually do the day-to-day work necessary to carry out the contracts are hired by the contractors, receive their pay checks from the contractors and are answerable to Carbide and Ferguson officials only. None of these employees are employees of the government. Carbide's contract takes pains to specify this:

> "Persons employed by the Corporation shall be and remain employees of the Corporation, and shall not be deemed employees of the Commission or Government, . . ." (R. 435).

Further, the contracts in question provide that the contractors shall procure all necessary permits and licenses and obey all applicable laws, regulations and ordinances of any government having jurisdiction over the area where the work is to be done (R. 456, 513). This fact is wholly inconsistent with the claim that the contractors are agencies of the United States. A federal officer is not subject to state regulation as respects matters of the administration of his duties. **Johnson v. Maryland**, 254 U. S. 51, 65 L. Ed. 126; **Ohio v. Thomas**, 173 U. S. 276, 43 L. Ed. 699.

C. Reserved Control Does Not Change a Contractor Into an Agent.

There is a well recognized distinction in the law between the status of agent and that of independent contractor. When one occupies the role of agent he is for practical purposes a mere servant of his principal, having no discretion as to the manner in which his work shall be done and being subject to control in every detail—not only as to how the work is to be done but who shall do it. On the other hand, an independent contractor undertakes to deliver a general result, and in accomplish-

ing that result he enjoys a greater or lesser degree of discretion as to the manner of doing it and the method of its execution.

It is very clear from the instant record that the contractors in question were employed to perform the very specialized task of operating and maintaining the government facilities at Oak Ridge because of their demonstrated skill in operating a high industrial complex in the case of Carbide and in the doing of highly specialized construction work in the case of Ferguson. AEC was without experience or "know-how" in these fields. This was recognized when the Atomic Energy Act was adopted, because prior thereto there was adopted in the bill before Congress provisions to enable AEC to use "management contracts for the operation of government owned plants so as to gain the full advantage of the skill and experience of American industry" (Sen. Rep. No. 1211, 79th Congress, 2nd Sess., p. 15).

The testimony of Mr. Sapirie, AEC's Oak Ridge Manager, points out that

> "the basic reason that we have continued to employ management contractors is that this provides a means for the Atomic Energy Commission to gain access to operating talents that are of extreme value to the requirements of our program" (R. 93).

Further, the testimony of Mr. Center, Carbide's top official at Oak Ridge, bespeaks Carbide's capacity, experience and skill in the field of industrial chemistry and physics:

> "Q. . . . How old is the Union Carbide Corporation, Mr. Center?
>
> A. I believe 1920. I am not positive about that.
>
> Q. It has occupied a prominent place in the fields of chemistry and physics since its inception?

A. Yes, we are the originators of the processes that are now known as petro chemicals.

Q. Between the years 1921 and the early '40's, Carbide had acquired a wealth of experience in the fields of chemistry and physics and the development of new products through physical and chemical studies.

A. That is true, yes, sir" (R. 283).

It is conceded that AEC retains a broad area of auditing, budgetary and accounting controls. Such, however, is a natural and commonplace thing where large amounts of public funds are involved. It is likewise true, and envisioned by the contracts, that there is constant top-level consultation between AEC's management personnel and the contractors' management personnel. This, however, does alter the fact that the day-to-day work of operating and managing the facilities is carried on by the contractors who are accorded a free reign as to the supervision of details and the hiring and firing of their own personnel. It is to the contractors that AEC looks for the results to be achieved, not to the employees of the contractors.

As to the question of whether extensive reservation of the right to control the general progress of the work, and whether such reservation vitiates the relationship of independent contractor, this Court stated in **Casement & Co. v. Brown**, 148 U. S. 615, 37 L. Ed. 582, at p. 622 of 148 U. S. as follows:

"With reference to the first contention: Obviously, the defendants were independent contractors. The plans and specifications were prepared and settled by the railroad companies; the size, form, and place of the piers were determined by them, and the defendants contracted to build piers of the prescribed form and size at the places fixed. They selected

their own servants and employes. Their contract was to produce a specified result. They were to furnish all material and the means of that work were to produce the completed structures. The will of the companies was represented only in the result of the work, and not in the means by which it was accomplished. This gave the defendants the status of independent contractors, and that status was not affected by the fact that, instead of waiting until the close of the work for acceptance by the engineers of the companies, the contract provided for their daily supervision and approval of material and work. The contract was not to do such work as the engineers direct, but to furnish suitable material and construct certain specified and described piers, subject to the daily approval of the companies' engineers. This constant right of supervision, and this continuing duty of satisfying the judgment of the engineers, do not alter the fact that it was a contract to do a particular work, and in accordance with plans and specifications already prepared. They did not agree to enter generally into the service of the companies, and do whatsoever their employers called upon them to do, but they contracted for only a specific work. The functions of the engineers were to see that they complied with his contract—'only this, and nothing more.' They were to see that the thing produced and the result obtained were such as the contract provided for."

The Supreme Court of Tennessee in a case analogous to **Casement & Co. v. Brown**, namely **Railroad v. Cheatham**, 118 Tenn. 170, citing the **Casement & Co.** case as authority, stated as follows:

"But neither the reservation of the power to terminate the contract when in the discretion of the

engineer the work is not progressing satisfactorily, the right to exercise general supervision and inspect the work as it progresses, nor the right to enforce forfeitures, will change the relation so as to render the company liable.

"The fact that the employer reserves the right to change the plans of doing the work, or that the work shall be done to the satisfaction of the employer, or of an agent appointed by him or that the employer reserves the right to discharge any of the contractor's men, does not affect the question. **A partial reservation or control in certain respects does not transform a contractor into a mere servant.** If in fact the contract places the contractor in an independent relation, and he reserves general control over the work as to the manner of doing it and method of its execution, the fact that the employer reserves the right to prescribe what shall be done, but not how it shall be done or who shall do it, does not divest him of the character of a contractor. Wood on Master and Servant, 614." (Emphasis supplied.)

It is therefore clear that even broad reservation of control by the contractee will not suffice to constitute a contractor as an agent or servant where the actual responsibility for performance of the details of the work, and control of the employes who do it, is vested in the contractor.

D. The Livingston and Kern-Limerick Cases Do Not Sustain Appellants' Claim of Agency.

Appellants place heavy reliance upon the case of **U. S. A. & DuPont v. Livingston**, decided by a 3-judge Federal District Court in South Carolina in 1959 and reported in 179 F. Supp. 9, appeal in which was dismissed by this Court without opinion, 364 U. S. 281, 4 L. Ed. (2d) 1719.

That case involved the applicability of the South Carolina use tax to programs by DuPont, a cost-type contractor with AEC operating the latter's Savannah River project. The 3-judge Court held that the tax was unconstitutionally applied to such programs, with which result this Court agreed by a per curiam dismissal of South Carolina's appeal.

Some of the facts in that case were quite similar to those appertaining to Carbide in the instant causes. DuPont, a large private corporation with experience in chemistry, was engaged by AEC to construct and operate the Savannah River project. It was to conduct research and development and train personnel as required by AEC, subject to the latter's approval. All materials procured by it belonged to the government. It was provided with a revolving bank account from which it could draw in payment of purchases and expenses subject to AEC control and supervision, and was required to keep its Savannah River project records separate from its private commercial transactions. All patents, specifications and data growing out of the work belonged to AEC which held DuPont harmless for all losses other than those resulting from bad faith or misconduct.

These facts are parallel to those of the instant Carbide case.

In other very material respects however the facts of the Oak Ridge operation differ markedly. First, DuPont could enter into purchases or subcontracts without prior AEC approval only in amounts up to $10,000. Seventy-five per cent of DuPont's purchases were in amounts over $10,000. Carbide's ceiling is not $10,000 but $100,000. Without doubt Carbide has dealt with its supplies upon its own judgment and discretion far more than it has upon the prior approval of AEC. The testimony of Mr.

Vanden Bulck, AEC's assistant manager for administration at Oak Ridge, confirms this (R. 228).

Further, in the **Livingston** case, DuPont received no compensation for its services, being motivated only by patriotic considerations (actually it was paid $1.00 for the entire 8 years covered by the litigation), whereas Carbide has received and continues to receive a very substantial fee (nearly $3,000,000 per year) plus other direct benefits.

The 3-judge Court found that DuPont was really the "alter ego" of AEC, and that the procurements made by DuPont for AEC were clothed with the government's constitutional immunity. It is to be noted here that this appeal involves no claim of immunity for appellant-contractors' purchases or procurements, that question having already been resolved in their favor by the Tennessee Supreme Court. What is involved here is rather the question of whether the contractors' **uses** are exclusively for the benefit of AEC.

Appellants also rely upon the case of **Kern-Limerick, Inc. v. Scurlock**, 347 U. S. 110, 98 L. Ed. 546. That case involved again the matter of whether a government agency had effectually constituted its contractor as its agent for the purpose of insulating its procurements for the government from a state sales or use tax. At the instance of the navy, its contractor issued to various suppliers purchase orders stating that the purchases were made by the government, which was obligated for the price, and that title should pass directly to the government from the vendor. The purchase orders were signed by the contractor as purchasing agent.

Once more it is to be emphasized that the Tennessee Supreme Court recognized appellant-contractors as agents for AEC for the purpose of procurement. The **Kern-Limerick** case does not hold that the contractor in that

case would have been free from a tax imposed with respect to his use of materials purchased in fulfillment of his contract. Arkansas evidently had no provision in its statute making use a taxable incident in and of itself and without regard to the ownership of the property used.

It is thus seen that both the **Livingston** and the **Kern-Limerick** cases, notwithstanding their efficacy in establishing the fact that the government may make private contractors agents for the purpose of procurement, are in no sense authority for the proposition that the contractors in the instant causes have been made general agents of the government to such an extent that they are immune from state taxation with respect to any activity constituting a taxable privilege in Tennessee.

THE FACT THAT THE ULTIMATE BENEFICIARY OF THE USE IS THE GOVERNMENT DOES NOT MEAN THAT THE USER HAS NO SEPARATE TAXABLE INTEREST.

Perhaps the essence of the case presented by appellants in these causes is their position that a state may not impose a privilege tax upon a private party dealing with the government unless it can be shown that such party has a separate beneficial interest in his undertaking, and that appellant-contractors herein have no such interest. They emphasize that no one other than the government receives any ultimate benefit from the work done by the contractors. They analogize the contractors to mere employes or servants of the government whose sole interest is the wage received from the government.

The very obvious answer to appellants' insistence that only the government is the ultimate beneficiary is that the government is always the ultimate beneficiary of a contract being performed for it by private parties. In this respect the government is no different from the pri-

vate contractee. When the work is finished it belongs exclusively to the contractee, and the consideration for the work has inured to the benefit of the contractor. This is true whether the contractor or the government, or private contractee, owns the materials at the time the contractor erects or applies them.

It must not be overlooked that the construction contractors in **Alabama v. King & Boozer**, supra, had no title to the materials used by them in constructing an army camp, and that they received no benefits from their use of them for the government other than their fixed fee. Likewise, Esso Standard Oil Co., in **Esso Standard Oil Co. v. Evans**, supra, did not own one drop of the gasoline which it handled and stored for the government, such being at all times the property of the government which alone ultimately received and beneficially used it, with Esso's only interest in the matter being the gallonage fee which it received for its services.

Certainly, in the case of **Detroit v. Murray Corp.**, one of the recent Michigan property tax cases, supra, the Murray Corporation had no interest in the government owned materials upon which it was performing work, other than the realization of compensation for its services from the government through a prime contractor.

What any contractor is paid for is the exercise of his knowledge, skill and labor in the effectuating of designated work, whether the work be the delivery of a completed edifice or structure, or the continuous management and operation of an industrial complex. He is not in any real sense a dealer in materials for profit. His undertaking consists usually of taking materials, whether procured by himself or others, and changing their form or identity so that something new is created. It is for his knowledge, ingenuity, and skill in the application of labor that he is compensated, and that compensation forms his primary

if not exclusive, motivation for his efforts. Arguments surrounding the question of beneficial use in the contractor therefore approaches being a mere play upon words.

The record herein shows that both appellant-contractors are engaged by AEC upon a long-term basis. Carbide has been on the scene since the outset of the atomic-energy program, and Ferguson for several years. Each receives a very substantial remuneration for the performance of work in fields in which they have a demonstrated proficiency. Each it might be added realizes its remuneration without having to invest its own capital in the undertaking. It cannot be doubted that there are numberless contractors working in the field of purely private enterprise whose profits from their endeavors are much less than those of Carbide and Ferguson at Oak Ridge. Without detracting in the slightest from the patriotism of either firm or the stockholders of either, it is to be doubted that either would have committed itself to the government to such an extent as both have unless the normal profit motives of private business had come into play. We cannot infer otherwise under the instant record.

Aside and apart however from their substantial immediate financial rewards, both contractors receive undoubted other tangible and intangible benefits. The record shows that Carbide commercially sells uranium to AEC from its privately owned mines and plants in Wyoming and Colorado (R. 246). Presumably these sales are for the purpose of profit. The record does not show otherwise. Would Carbide have such a market, absent the atomic energy program to which Carbide's Oak Ridge and Paducah undertakings are so vital? Said Carbide's vice president Center of Carbide's western mines and mills:

> ". . . They have been built, designed, and put into operation with money from the corporation. However,

the installation of these mills was not possible until we had a supply contract from the Atomic Energy Commission to whom we sell uranium concentrates" (R. 246).

Additionally, Carbide makes sales to AEC (though with AEC's prior written approval) from its other operating divisions, notably Linde Airproducts Company. Mr. Center was asked if Linde Airproducts Company was in any wise interested in the Oak Ridge operation. He replied:

"Interested in selling oxygen, nitrogen, and any other products it can sell, yes."

Such sales must of course be assumed to be made with an eye to deriving as much profit as possible, and if there were no atomic energy program at Oak Ridge, in which Carbide plays so vital a part, this market would not exist.

Besides such tangible benefits, there are numerous intangible ones which cannot be realistically ignored. The following excerpt from Mr. Center's testimony is significant:

"Q. Would you consider it to be a thing of value to Union Carbide Corporation, Mr. Center, to be able to place its employees at the Oak Ridge Operations and leave them for a number of years and then transfer them into some other division?

A. Yes" (R. 286).

The record reveals that numerous personnel have been transferred from Carbide's private operations to its Oak Ridge undertaking, and vice versa (R. 284-285).

The atomic energy field, of course, is a relatively new one. In all probability the industrial potential of atomic energy has not yet begun to be realized. It is widely

believed that it is destined to play a major role in the future economy of this nation and the world. We must assume that Carbide's very close connection with the Oak Ridge program has afforded, and will continue to afford to it an experience well-nigh incalculable in value as a matter of future business. Can it be denied for a moment that Union Carbide Corporation will enjoy over competing industries a tremendous advantage whenever the fruits of atomic development are made available to industry generally?

Carbide has a very real beneficial interest in a situation which enables it to train its personnel and at the same time create and enhance a market for the products already being manufactured by Carbide.

Indeed, this record shows that Carbide has much more than a passing interest in atomic development. If it were otherwise, it is to be doubted that it would spend its own money for the providing of scholarships at various institutions of learning, or for the training of its own personnel currently at the Oak Ridge installation (R. 287). Other corporations have demonstrated similar interest and have arranged with AEC and Carbide to train their people at Oak Ridge (R. 293-294). It is hardly foreseeable that Carbide will one day turn its back on what it has done and what it has learned, leaving the field to these and other business competitors.

What has been said here of Carbide is hardly less apropos in the case of Ferguson. Ferguson's assignment at Oak Ridge is specialized construction work upon specialized facilities where precise scheduling and minimal interference with normal industrial operation is necessary. Apart from its financial remuneration, Ferguson is no doubt accumulating invaluable experience in the performance of technical and precise industrial construction. The industry at Oak Ridge is almost without parallel in the

annals of man. Any construction contractor operating at length in its midst will acquire skills and qualifications which its competitors will not be likely to enjoy.

To advance the contention that corporations in the position of appellant-contractors, enjoying great present benefits plus untold potential benefits, have no beneficial interest in the vast amount of goods which they handle, apply, manage, and develop in the course of consummating so gigantic an undertaking approaches the ridiculous. If such contention be meritorious, then no contractor working on a cost-plus or time-and-material basis, the number of which are legion today, can be said to have beneficial interest in the lumber, nails, cement and other items which he incorporates into his undertaking.

Appellee cannot of course deny that Carbide and Ferguson are engaged in the performance of government business at Oak Ridge. The fact, however, that it is the government's business cannot be taken to exclude the demonstrable interest therein shared by Carbide and Ferguson. **The business of the United States is also Carbide's and Ferguson's business.**

CONCLUSION.

The Tennessee taxes in question are not imposed upon the government, but upon private parties having a contractual relationship with the government. They are privilege taxes upon the use of tangible personal property in the performance of a contract, not taxes upon the property itself. They are not here imposed upon the privilege of purchasing or procuring of property. They do not discriminate against the federal government. The contractors, in the absence of any congressional delegation to them of the government's immunity, are liable for those taxes, notwithstanding that the government has obligated itself vol-

untarily to assume them. The judgment of the Tennessee Supreme Court should be affirmed.

Respectfully submitted,

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GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

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MILTON P. RICE,
Assistant Attorney General,

.....

WALKER T. TIPTON,
Assistant Attorney General.

Proof of Service.

I, Milton P. Rice, Assistant Attorney General, State of Tennessee, one of the attorneys for Donald R. King, successor in office to B. J. Boyd, as Commissioner of Revenue of the State of Tennessee, appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 1st day of April, 1964, I served a copy of the foregoing reply brief upon the Honorable Archibald Cox, Solicitor General of the United States, Department of Justice, Washington, D. C., 20530, by mailing same in a duly addressed envelope with airmail postage prepaid.

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Milton P. Rice,
Assistant Attorney General.